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Supreme Court, U.S.
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No. 08-148

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In The

Supreme Court of the United States

DAVID E. MARTINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THIS COURT'S DECISION IN *UNITED STATES v. SANTOS*, 128 S.CT. 2020 (2008), NECESSITATES THAT THIS CASE BE REMANDED TO THE ELEVENTH CIRCUIT TO RECONSIDER ITS DECISIONS AFFIRMING THE CONVICTION, 454 F.3d 1300 (2006) AND AFFIRMING THE SENTENCE, 265 Fed.Appx. 784 (2008), IN LIGHT OF THE FACT THAT BOTH DECISIONS CONCLUDED THAT *ALL* PROCEEDS OF A MAIL FRAUD OFFENSE CONSTITUTE MONEY LAUNDERING PROCEEDS, REGARDLESS OF WHETHER THE MONEY REPRESENTS PROFIT?

CERTIFICATE OF INTERESTED PARTIES

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Martinelli, David E. Petitioner, presently incarcerated at Talladega Federal Correctional Institution

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OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals regarding Petitioner's sentence (App. 1-12) was unreported, but can be found at 265 Fed.Appx. 784 (2008). The decision of the Eleventh Circuit Court of Appeals affirming Petitioner's conviction (App. 13-62) is reported at 454 F.3d 1300 (11th Cir. 2006).

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on February 13, 2008. The order of the Eleventh Circuit Court of Appeals denying the petition for rehearing and petition for rehearing *en banc* was denied on May 5, 2008. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

18 U.S.C. § 1956(h) (App. 67); U.S.S.G. § 2S1.1 (2000) (App. 68).

STATEMENT OF THE CASE

This cases poses the following question: In a money laundering case in which the defendant was alleged to have engaged in acts of mail fraud and then conspired to launder the proceeds of the mail

fraud offense in an effort to conceal the "proceeds" and to use the "proceeds" to promote further acts of unlawful activity, must the jury be instructed that only the *profits* of the mail fraud offense may be considered to be proceeds that are laundered and may the judge, in imposing sentence, consider the entire gross receipts of the offense in calculating the money laundering sentencing guidelines?

A. The Eleventh Circuit Court of Appeals Decisions

Following Petitioner's conviction of conspiracy to commit money laundering, the Eleventh Circuit held that the trial court did not err in refusing to instruct the jury that the payment of legitimate business expenses does not constitute "promotion prong" money laundering, 454 F.3d at 1317-1318. The Eleventh Circuit also upheld the trial court's refusal to instruct the jury that simply depositing money derived from acts of mail fraud into a bank account does not constitute "concealment prong" money laundering, 454 F.3d at 1318-1319.

Following remand from the Eleventh Circuit (to re-sentence Petitioner consistent with the holding in *United States v. Booker*, 543 U.S. 220 (2005)), the trial court computed the defendant's money laundering sentencing guidelines by calculating the total amount of money received by the defendant as a result of his mail fraud offense, despite Petitioner's argument that much of the money he received was

never laundered. The money was not shown to have been deposited in a manner designed to conceal the location or source of the money and was not used to promote further acts of mail fraud, or any other offense. The sentencing court rejected this argument and calculated the sentence on the basis of the gross receipts of the mail fraud offense (with one insignificant deduction). The Eleventh Circuit affirmed. 265 Fed.Appx. 784 (2008). The Eleventh Circuit held that the "value of the funds" involved in the offense – the basis for calculating the sentencing guidelines in 2000 – is equivalent to the total amount of money received by the defendant during the course of the criminal behavior. In other words, the gross receipts received as a result of Petitioner's acts of mail fraud would be considered as the "value of the funds" that were laundered.

The decision of this Court in *United States v. Santos*, 128 S.Ct. 2020 (2008), demonstrates that the Eleventh Circuit erred in its initial decision affirming the conviction and in its second decision affirming the trial court's sentence. Petitioner was correct in the initial appeal when he contended that the jury should have been instructed with precision about the necessity of delineating between legitimate business expenses (such as paying rent, taxes, salaries and utilities) and laundering through concealment or laundering by promoting additional offenses. Petitioner was also correct in the second appeal when he argued that the "value of funds" involved in the money laundering offense does not include transactions with

money that were neither designed to conceal the source or location of the money, nor used to promote further unlawful activity.

B. The Course of Proceedings

Petitioner was initially indicted in the Northern District of Florida on August 21, 2003 and charged with one count of conspiring to commit money laundering in violation of 18 U.S.C. § 1956(h). The indictment charged that he conspired to launder money that represented the proceeds of mail fraud activity and that he did so, knowing that the money laundering transactions were designed to promote the carrying on of further mail fraud offenses.

Following a jury trial, Petitioner was convicted on the sole count of the indictment and was sentenced to 210 months in prison. He is currently incarcerated.

On July 10, 2006, the Court of Appeals for the Eleventh Circuit affirmed the judgment of the lower court. *United States v. Martinelli*, 454 F.3d 1300 (11th Cir. 2006) (App. 13-62). The Eleventh Circuit ordered that a re-sentencing hearing was necessary in light of the decision in *United States v. Booker*, 543 U.S. 220 (2005).

Petitioner filed a petition for a writ of certiorari with this Court, challenging the Eleventh Circuit's decision affirming the decision. This Court denied the petition. 127 S.Ct. 1846 (2007).

In 2007, Petitioner was re-sentenced by the trial court in the Northern District of Florida. He appealed that judgment and the Eleventh Circuit affirmed the sentence in an unpublished decision on February 13, 2008, 265 Fed.Appx. 784 (11th Cir. 2008) (App. 1-12). On March 5, 2008, Appellant petitioned the Court for Rehearing En Banc. The Petition was denied on May 5, 2008 (App. 65).

C. Statement of Facts

Petitioner, David Martinelli, operated a series of companies from 1995 through 2000 that were designed to assist small business owners sell their businesses. Martinelli charged a fee to the customer. As recited in the lower court's first opinion, the government alleged that the methods by which Martinelli's company solicited customers included various misrepresentations that induced the customers to believe that Martinelli's company was more successful than it really was in achieving sales of the customers' businesses. All the money obtained from the customers, according to the indictment, reflected the proceeds of mail fraud. That is, the customers were defrauded by the sales pitch that induced them to pay Martinelli's company to facilitate the sale of their small businesses. Martinelli deposited the money into bank accounts and used the money to continue the operations of his company, including paying normal operating expenses of the company, such as salaries of employees, utilities and taxes. The government alleged that all the financial transactions with the

customers' money amounted to money laundering and that the financial transactions were knowingly designed to promote further acts of mail fraud.

At trial, the defendant submitted jury instructions that explained to the jury that *all* transactions with money derived from mail fraud offenses are not necessarily money laundering transactions. Money that is used to pay normal business expenses, for example, do not qualify as "promotion prong" money laundering. The trial court refused to instruct the jury as requested and the Eleventh Circuit affirmed.

On remand, Petitioner was re-sentenced in accordance with *United States v. Booker*, 543 U.S. 220 (2005). At sentencing, Petitioner argued that the total amount of money obtained as a result of the mail fraud offense did not qualify as the "value of the funds" that were involved in the offense. The "value of the funds" was the measure of a money laundering offense in 2000. U.S.S.G. § 2S1.1 (2000). Petitioner argued that money that was not used to actually further additional acts of mail fraud and transactions that were not designed to conceal the nature, source, or location of the money, could not be considered as the "value of the funds" in the sentencing guideline calculation. The trial court disagreed and calculated the money laundering guidelines based on the total receipts of the mail fraud conduct. The Eleventh Circuit affirmed. 265 Fed.Appx. 784 (2008).

ARGUMENT

IN LIGHT OF THIS COURT'S DECISION IN *UNITED STATES v. SANTOS*, 128 S.CT. 2020 (2008) THE DECISIONS OF THE ELEVENTH CIRCUIT SHOULD BE REVERSED AND THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR RECONSIDERATION

On June 2, 2008, this Court decided the case of *United States v. Santos*, 128 S.Ct. 2020 (2008). *Santos* held that the term "proceeds" as used in the money laundering statute, 18 U.S.C. § 1956, was ambiguous thus invoking the rule of lenity. It further found that as it applied to the money laundering statute, "proceeds" refer to "profits" not "receipts" of the predicate specified unlawful activity. In *Santos*, the money laundering charges were based on the defendant's payment to lottery winners and his employees. The charges brought against the co-defendant were based on his receipt of payments as an employee. As neither transaction was fairly characterized as a transaction involving profits of the specified unlawful activity, the Court held that the government failed to show that the defendants laundered criminal profits. Therefore, the Supreme Court upheld the Seventh Circuit decision granting a motion for post conviction relief.

David Martinelli repeatedly argued at trial, sentencing and through the appellate process that the government was required to show more than deposits in a bank account to establish the offense of money laundering. He argued throughout trial that spending money derived from the mail fraud offense on normal

office expenses, such as salaries, tax payments and utilities, did not amount to money laundering transactions. He argued at sentencing that simply because money was obtained from acts of mail fraud did not necessarily mean that the money was laundered. The money received as a result of the mail fraud offenses was not equivalent, without additional proof, to money laundering transactions. His situation is directly analogous to that in *Santos*, where the transactions on which the money laundering convictions were based (payments to runners, winners and collectors in the illegal lottery) were ultimately deemed receipts, not profits, and therefore not proceeds of money laundering. Like the defendant in *Santos*, David Martinelli's payment of business expenses are not profits and therefore should not be treated as the laundering of proceeds.

Nevertheless, the trial court, at the urging of the government simply used *all* the money obtained by the company (that is, all the fraudulently obtained money) and treated it all as proceeds. *Martinelli*, 265 Fed.Appx. 784, 786 (11th Cir. 2008). Because of the dramatic difference between the Fraud Guideline and the Money Laundering Guideline, this failure to require the government to distinguish between profits and receipts had a dramatic impact on the sentence.

Santos has now confirmed without ambiguity the correctness of Petitioner's position. In light of the decision in *Santos*, Petitioner urges this Court to reverse the decision of the Eleventh Circuit and to

remand for further consideration in light of the intervening *Santos* decision.

CONCLUSION

WHEREFORE, Appellant David E. Martinelli urges this Court to accept this Petition for a Writ of Certiorari to the Eleventh Circuit.

Respectfully submitted,

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265 Fed.Appx. 784

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

David E. MARTINELLI, Defendant-Appellant.

No. 07-11225

Non-Argument Calendar.

Feb. 13, 2008.

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Donald F. Samuel, Edward T.M. Garland, Garland, Samuel & Loeb, P.C., Atlanta, GA, for Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida. D.C. Docket No. 03-00033-CR-5-MCR.

Before BARKETT, MARCUS and PRYOR, Circuit Judges.

PER CURIAM:

This is David E. Martinelli's second appeal from his 210-month sentence for conspiracy to commit money laundering, a violation of 18 U.S.C. § 1956(a)(1) and (h). We previously affirmed Martinelli's conviction but vacated and remanded for resentencing in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). *See United States v. Martinelli*, 454 F.3d 1300 (11th

Cir.2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 1846, 167 L.Ed.2d 324 (2007). On remand, the district court again imposed a 210-month sentence. In this appeal, Martinelli argues that the district court: (1) erred in calculating the "value of the funds," for purposes of U.S.S.G. § 2S1.1(b)(2), because it failed to determine the actual amount that was laundered; (2) erred in its application of U.S.S.G. § 3B1.1(a) because it considered all of the fraud-related acts, but there was no evidence that Martinelli was the leader or organizer of an extensive money laundering offense; and (3) imposed an unreasonable sentence and failed to adequately consider his age. After thorough review of the record, we affirm.

Martinelli first argues that the district court erred in calculating the money laundering amount for purposes of U.S.S.G. § 2S1.1. Martinelli contends that the court "simply used *all* the money obtained by the company (that is, all the fraudulently obtained money) and treated it as all laundered money." According to Martinelli, a considerable amount of the company's receipts was used legitimately by the company. Martinelli argues that his guidelines calculation would have been lower if the court calculated the actual amount of money laundered, and it was error for the court to use the fraud loss amount. According to Martinelli, although the current version of § 2S1.1 is inapplicable for *ex post facto* reasons, it defines "laundered funds" as funds involved in the violation of 18 U.S.C. §§ 1956 or 1957. In his reply brief, Martinelli contends that the government failed

to meet its burden of showing how much money was laundered, and there was no "relevant conduct" to consider.

We review "the district court's determination of the facts concerning the amount of money involved in a money laundering scheme only for clear error." *United States v. Paley,* 442 F.3d 1273, 1276 (11th Cir.2006) (interpreting the post-2001 version of § 2S1.1). We review "the district court's interpretation of the sentencing guidelines *de novo.*" *Id.* "We will reverse the district court only if any error was harmful." *United States v. Paz,* 405 F.3d 946, 948 (11th Cir.2005).

Pursuant to the 2000 version U.S.S.G. § 2S1.1,[1] the defendant should be assigned a base offense level of 23 if he was convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A). U.S.S.G. § 2S1.1(a)(1) (2000). "Section 2S1.1(b) provides for increases in the base offense level for specific offense characteristics, including the amount of money laundered." *United States v. Martin,* 320 F.3d 1223, 1225-26 (11th Cir.2003) (interpreting the pre-2001 version of § 2S1.1). Eight levels should be added where the "value of the funds" exceeds $6 million. U.S.S.G. § 2S1.1(b)(2)(I) (2000). "The commentary to § 2S1.1 states, 'The amount of money involved is included as

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[1] The district court applied the November 1, 2000 edition of the Sentencing Guidelines, and Martinelli concedes that the 2000 version of the Guidelines is applicable to his case.

a factor because it is an indicator of the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise.'" *Martin*, 320 F.3d at 1226.

In determining the "value of the funds," "the district court is 'required to consider the total amount of funds that it believed was involved in the course of criminal conduct.'" *United States v. Barrios*, 993 F.2d 1522, 1524 (11th Cir.1993) (citation omitted) (holding that legitimate interest earned could be used to calculate the value of the funds for purposes of the pre-2001 version of § 2S1.1). "The 'value of the funds' involved in a money laundering offense is identified by § 2S1.1(b)(2) as a 'Specific Offense Characteristic' and, therefore, sentencing under that section necessarily must take into account 'all acts and omissions committed . . . by the defendant . . . during the commission of the offense.'" *Id.* (*quoting* U.S.S.G. § 1B1.3(a)(1)(A)). We have noted that "funds" "obviously refer[s] to funds that are used by the defendant in an unlawful monetary transaction." *Id.* (citation omitted).

On November 1, 2001, § 2S1.1 was substantially amended. We discussed the 2001 amendment in *Martin*, 320 F.3d at 1227 n. 3:

> The 'value of the funds' is no longer used as a specific offense characteristic. Instead, the base offense level for money laundering is determined by reference to the underlying offense from which the laundered funds were derived or by reference to the chart in

> § 2B1.1 corresponding to the 'value of the laundered funds.' U.S.S.G. § 2S1.1(a). Additionally, under the 2001 Guidelines, a defendant's base offense level is increased 2 levels for 'sophisticated laundering,' such as two or more levels (i.e. layering) of transactions. U.S.S.G. § 2S1.1(b)(3) & cmt. n. 5 (2001). The 1998 Guidelines do not contain a similar provision regarding sophisticated laundering.

Id. The term "laundered funds" is defined in the 2001 amendment as "the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. § 1956 or § 1957." U.S.S.G. § 2S1.1 cmt. n. 1.

As an initial matter, Martinelli does not challenge the district court's finding that $6.6 million was fraudulently obtained by the company, even though he contested that figure at the first sentencing hearing. Martinelli also argued in the district court that the "ceiling" amount the court could consider was the jury's determination of the $4.4 million forfeiture amount, but he fails to reassert that argument on appeal. Therefore, he has abandoned those issues. *United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir.2005) ("issues not raised in a party's initial brief are deemed abandoned and generally will not be considered by this Court").

The district court did not clearly err in calculating the "value of the funds" for purposes of

§ 2S1.1(b)(2). In its application of the 2000 version of the Guidelines, the court was required to determine the "value of the funds," not the amount of "laundered funds." Thus, the record supports the court's finding that the value of the funds was $6.1 million because that amount took into account all acts and omissions committed by Martinelli during the commission of the offense, and the entire amount was undisputedly involved in the course of the criminal conduct.

Martinelli next argues that the district court erred by enhancing his sentence under U.S.S.G. § 3B1.1(a) because it confused the underlying fraud offense with the money laundering offense of which he was convicted. He contends that his conduct in committing the underlying fraud offense was not "relevant conduct" in the money laundering guideline. Martinelli does not challenge that he was leader of the company or that he was responsible for his employees who fraudulently obtained money for the company. He also does not dispute that the fraud offense was "otherwise extensive." However, according to Martinelli, there was no proof that he managed anyone during the course of the money laundering offense, nor was there evidence that the money laundering offense was "otherwise extensive."

A district court's decision to enhance a defendant's offense level based on a leadership role under U.S.S.G. § 3B1.1 is a finding of fact reviewed only for clear error. *United States v. Phillips*, 287 F.3d 1053, 1055 (11th Cir.2002). "The government bears the burden of proving by a preponderance of the evidence

that the defendant had an aggravating role in the offense." *United States v. Yeager*, 331 F.3d 1216, 1226 (11th Cir.2003).

The Guidelines allow for a four-level increase to the defendant's offense level if he "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). The Guidelines further direct that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct)." *Id.*, introductory cmt. "Relevant Conduct" includes:

> (A) All acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

U.S.S.G. § 1B1.3(a)(1). "[T]he focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator." *Id.*, cmt. n. 1.

"To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." U.S.S.G. § 3B1.1 cmt. n. 2. A "participant" is "a person who is criminally responsible for the commission of the offense, but need not have been convicted." *Id.*, cmt. n. 1. In deeming an organization to be "otherwise extensive," "all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive." *Id.*, cmt. n. 3.

The factors a court should consider in determining a leadership and organizational role include:

> [T]he exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.

U.S.S.G. § 3B1.1 cmt. n. 4.

Because Martinelli does not contest that he was the leader or organizer of the extensive fraud offense, the only issue to decide is whether his conduct as a leader or organizer in the fraud offense is "relevant

conduct" in determining his role in the offense for his money laundering conviction. The district court did not clearly err in applying the U.S.S.G. § 3B1.1(a) enhancement based on Martinelli's role in the money laundering offense. Even though Martinelli was not convicted for the underlying fraud offense, he was accountable for those acts because the acts were committed during the commission of the money laundering offense. Thus, the fraud conduct was "relevant conduct" and the district court properly considered those acts when it determined Martinelli's role in the money laundering offense.

Lastly, Martinelli argues that the 17-year sentence was unreasonable because it amounts to a life sentence given that he is 67 years old, and because Martinelli demonstrated that, by applying the 18 U.S.C. § 3553(a) factors, a 5- or 10-year sentence would be sufficient but no more than necessary to achieve the legitimate goals of sentencing. Thus, Martinelli contends that although his sentence was within the guideline range, it was unreasonable.[2]

In *Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007), the Supreme Court held that appellate courts must undertake a two-part

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[2] Martinelli did not address the reasonableness of his sentence in his reply brief, but instead, argued for the first time that the district court erred by: (1) failing to impose restitution; and (2) imposing a fine. However, Martinelli has abandoned these issues because he failed to raise them in his opening brief. *See Levy*, 416 F.3d at 1276 n. 3.

process in reviewing the sentence imposed by the district court. First, the appellate court must determine whether the district court followed proper procedures. *Id.* at 597. Second, "the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.* "In reviewing the ultimate sentence imposed by the district court for reasonableness, we consider the final sentence, in its entirety, in light of the § 3553(a) factors." *United States v. Thomas,* 446 F.3d 1348, 1351 (11th Cir.2006).[3] Our "[r]eview for reasonableness is deferential," and "[t]he party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in the light of both th[e] record and the factors in section 3553(a)." *Id.* (citing *United States v. Talley,* 431 F.3d 784, 788 (11th Cir.2005)).

We do not "presume reasonable a sentence within the properly calculated Guidelines range." *United*

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[3] The § 3553(a) factors that a district court must consider include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) the pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a)(1)-(7).

States v. Campbell, 491 F.3d 1306, 1313 (11th Cir.2007); *see also Rita v. United States,* ___ U.S. ___, 127 S.Ct. 2456, 2462, 168 L.Ed.2d 203 (2007) (holding that appellate courts may apply a presumption of reasonableness to a within-guidelines sentence). However, while a sentence within the advisory guidelines range is not *per se* reasonable, we would ordinarily expect such a sentence to be reasonable. *Talley,* 431 F.3d at 787-88. Moreover, "nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors." *United States v. Scott,* 426 F.3d 1324, 1329 (11th Cir.2005).

Martinelli failed to establish that his sentence is unreasonable. As for procedural reasonableness, the district court properly considered the advisory guidelines range and noted that the case had been remanded in light of *Booker.* In fact, Martinelli does not argue that the district court erred in calculating the advisory guidelines, nor that it committed any other procedural error.

As for substantive reasonableness, the district court considered the relevant § 3553(a) factors and articulated its reasons in open court, discussing, among other things, the seriousness of the crime and finding that a lesser sentence would not be just and appropriate under the facts of the case. The court also considered the issues Martinelli raised regarding his age and health. It then sentenced Martinelli to 210 months' imprisonment, which was in the middle of

the advisory guidelines range of 188-235 months. The court did not abuse its discretion and impose an unreasonable sentence. Therefore, we affirm.

AFFIRMED.

454 F.3d 1300

United States Court of Appeals, Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
David E. MARTINELLI, Defendant-Appellant.
No. 04-13977.

July 10, 2006.

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Nancy J. Hess, Dixie Angela Morrow, U.S. Atty., Pensacola, FL, E. Bryan Wilson, Tallahassee, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before DUBINA, MARCUS and COX, Circuit Judges.

MARCUS, Circuit Judge:

David Martinelli appeals from his conviction after a jury trial and the ensuing 210-month prison sentence for conspiring to launder money in violation of 18 U.S.C. §§ 1956(a)(1) and (h). Martinelli claims that the district court should have suppressed certain evidence, that it erred in its jury instructions and at sentencing. After thorough review, we affirm the conviction but remand for resentencing in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

I.

The basic facts developed at trial in this money laundering conspiracy case are these. In 1995, Martinelli and two associates formed Global Business Services, Inc. ("GBS"),[1] a corporation purportedly designed to facilitate the sale of small businesses by putting hopeful sellers in contact with willing buyers. GBS would randomly send letters to small-business owners, attempting to locate those who were interested in selling their business. When a potential seller responded, a GBS representative would meet with the client and gather information about the business. The representative would explain that GBS placed generic advertising in national publications representing that it had businesses for sale; when interested buyers responded, GBS would attempt to match them with compatible sellers.

A seller was required to sign a contract whereby it agreed to pay GBS a certain percentage of the total value of the business in exchange for the advertising. Donald Cox, the original President and CEO of GBS, testified for the government at trial that clients had to immediately pay a small percentage, "around 2 percent," and then an additional "5 to 7 percent" if the business actually sold. The government also presented evidence of initial fees ranging from $1,900

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[1] The business underwent several name changes, including Worldwide Business Services, Inc. and International Business Associates. For convenience, we use GBS throughout, except where it is necessary to differentiate between the various entities.

to $16,900. The contracts stated that GBS would provide advertising until the business sold, but did not guarantee an actual sale. Mr. Cox stayed with GBS for slightly under twelve months and testified that, during this time, GBS did not facilitate the sale of a single business.

Cox also testified concerning numerous misrepresentations made by GBS. Thus, for example, he said that GBS sent direct mailings to small-business owners with testimonials from allegedly satisfied customers describing how GBS helped to sell their businesses. In fact, there were no such customers, and the people pictured in the representations were actually Martinelli and other GBS employees. Cox also described how GBS represented in its mailings to putative sellers that *all* of its buyers were prequalified to ensure they had the financial ability to purchase a business when, in fact, such screening was discontinued soon after GBS was formed. Moreover, Cox testified that GBS touted that it used a sophisticated computer matching system to bring together compatible buyers and sellers. Actually, at least initially, GBS had no computers at all, and all buyers and sellers were manually logged in record books.[2]

The government also presented the testimony of over 100 witnesses at trial, many of whom were

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[2] A computer system was eventually created. A GBS employee testified that the system was "never 100 percent finished" and that "there was room to improve."

businesspeople who signed contracts with GBS in hopes of selling their companies. They generally testified to receiving the false mailings, which advertised previously successful sales and a sophisticated computer matching system, and to the manner they were subsequently treated by Martinelli and other GBS employees. Various sellers said that a GBS employee who visited with them recounted the many sales GBS had facilitated in the past and predicted a "quick sell" for the business at hand. Many of the sellers never received any "match" at all, and those who did often found that the person purportedly interested in their business did not exist, had never heard of GBS, had no interest in buying a business, or was interested in a wholly unrelated kind of business. Indeed, sellers were given contact names of fictitious GBS employees and Martinelli placated those who complained by sending them bogus matches. As one GBS employee testified, there was "very little" emphasis on securing buyers because "our income was coming from" the sellers. In fact, the evidence established that GBS arranged the sale of only *one* business between 1995 and 2000, and even that sale occurred only after an ambitious GBS employee scoured the phone book and randomly located a buyer for a seller's trash company.

Carl Carr, an indicted co-defendant and GBS operations manager and vice president, pled guilty and also testified for the government. Carr described the fraud at GBS in great detail. He explained that the defendant, Martinelli, employed fake names in

GBS correspondence to avoid being recognized as having a role in the organization and to make it appear as if GBS had a large and stable workforce. Martinelli also knowingly placed false statements in GBS mailings, including assurances that buyers would be financially prequalified and promises of a sophisticated computer matching system, all designed to induce sellers to sign a contract with GBS. Carr confirmed that there was no sophisticated computer matching system and that the testimonials from satisfied customers were entirely false. He observed that GBS sales representatives were told of past successes because "[w]e wanted them to think that we were a reputable business and that we were doing what we said we were doing."

Moreover, Carr described how Martinelli falsified documents (including the application)[3] submitted to the Better Business Bureau so that GBS could become a member of that organization and then tout its membership to prospective customers. Finally, Carr confirmed that Martinelli was well aware of the

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[3] Carr testified that the Better Business Bureau requires its member companies to have been in business for at least two years. Because Martinelli could not satisfy that requirement, he and Carr created and submitted a sham commercial lease, which indicated that GBS had been renting office space since 1982. Moreover, Martinelli falsely stated on the application form that GBS had been in business, at the same location, for fifteen years. Carr testified that he and Martinelli felt that if GBS were a member of the Better Business Bureau, people "would think that we were . . . legitimate and reliable."

fraudulent activities at GBS, stating that Martinelli personally wrote many of the fraudulent mailings and knowingly engaged in the fraudulent practices to induce customers to sign with GBS.

The government also presented testimony regarding the money that was generated from the fraudulent activities. Among other things, GBS employees testified that when a seller submitted payment after signing a contract, that money was generally deposited into one of several GBS-controlled bank accounts. The money in those accounts was then used to fund the underlying scheme to defraud. Thus, for example, Martinelli used the fraudulently-derived proceeds to pay for more fraudulent brochures and mailings, which would, in turn, then be sent to additional potential customers, thereby generating still more illegal proceeds. Evidence was also presented that Martinelli and his family used funds drawn on GBS accounts for personal expenditures such as clothing for Mrs. Martinelli and cellular phone service for Martinelli's children.[4]

The government also presented evidence that GBS moved funds between various accounts under the guise of "loans" to and from GBS, even though the "loaned" money belonged to GBS in the first place.

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[4] There were also bank accounts (such as the "A-O Trust" accounts) that, although not specifically designated with the name of one of Martinelli's businesses, were used to receive client payments, pay business expenses, and fund personal expenditures (such as checks for meals and jewelry).

Thus, for example, GBS funds were deposited into a trust fund controlled by Martinelli, withdrawn via a check made out to cash, converted into a cashier's check, and then redeposited into a GBS account as the proceeds of a "loan." All told, between 1995 and 2000, some $6.6 million was deposited into bank accounts controlled by Martinelli and at least 1,521 customers of GBS were identified.[5]

A jury found Martinelli guilty of one count of conspiracy to launder money. He now challenges the district court's refusal to suppress certain evidence procured from several search warrants, the failure to give certain requested jury instructions, and his sentence.

II.

By early April of 2000, GBS had become World Business Services, Inc. ("WBS"), WBS had filed for bankruptcy, and Martinelli had re-opened his venture under the name International Business Associates ("IBA"). On April 12, 2000, investigators with the Bay County Sheriff's Office executed search warrants issued by a state judge at the former business location for WBS and the business location for IBA. More

[5] Additionally, Carl Carr testified that GBS established a special bank account to accept proceeds from credit card sales. Immediately after the funds were deposited from the credit card company, they would be transferred to a different account. In this way, there would never be funds available for the credit card company if a customer successfully disputed a charge.

than one year later, a United States magistrate judge issued a federal warrant for computers seized during those searches.

Martinelli moved to suppress the proceeds recovered from both the state and federal warrants. The district court conducted an evidentiary hearing, and ultimately ruled that (1) the state search warrants were supported by probable cause; (2) the state search warrants were not overbroad in failing to describe with particularity what was to be seized; (3) Martinelli was not entitled to a hearing pursuant to *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); (4) even if the warrants had been deficient, the evidence still would not be suppressed because of the "good faith exception" to the exclusionary rule; (5) the federal warrant was not tainted by any improprieties found in the state warrants; and (6) Martinelli did not have Fourth Amendment "standing" to challenge the WBS search in the first place. Martinelli challenges each of those rulings.

First, Martinelli says that the affidavits used in support of the applications for the state search warrants failed to establish probable cause. In reviewing a district court's ruling on a motion to suppress, we review findings of fact for clear error and the application of the law to those facts *de novo. United States v. Muegge,* 225 F.3d 1267, 1269 (11th Cir.2000); *see also United States v. Jiminez,* 224 F.3d 1243, 1248 (11th Cir.2000) (noting that we review *de novo* whether there was probable cause to support a search warrant, although "we must take care both to review

findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers" (internal quotation marks omitted)).

The affidavit supporting the WBS search warrant alleged, among other things, that the affiant, Investigator Steve Harbuck, was contacted in March of 2000 by Loving Enterprises, a business in Tampa. The complainant business claimed that it had been defrauded by WBS of approximately $4,000. Loving Enterprises further stated that other businesses had been similarly defrauded. This caused Harbuck to begin investigating WBS. He learned that WBS was owned and operated by David Martinelli and that the "nature of [WBS] was to advertize businesses for sale, and help locate buyers for said businesses."

In April of 2000, Harbuck received a list from the Better Business Bureau detailing some twenty-three complaints filed against WBS. Harbuck said that he verified the information in the list by calling "several" of the complainants, each of whom indicated that they had contracted with WBS in an effort to sell their business and that, although WBS collected an initial fee from them, it never subsequently performed *any* services. Harbuck said that he received "several" similar complaints against WBS from businesses throughout the United States, each of which averred that WBS collected a fee but provided no services in return. Harbuck traveled to the WBS location in Panama City Beach, where a building management representative told him that WBS

vacated the office suite on March 31, 2000, but had left behind numerous files and related office equipment. The affidavit observed that "[b]usiness related files and correspondence, employee files, [and] computer software and hardware" belonging to WBS would be found at the location, and that those items would be evidence of the "ongoing scheme to defraud."

The IBA affidavit was similar to the WBS affidavit. However, it added that Martinelli formed IBA, which assumed all of the contracts of WBS. Harbuck said that "[t]he material provided by [IBA] states that the operation of their business is identical to the business that was operated by [WBS]."

Martinelli argues that the affidavits fail to set forth probable cause because they are "silent as to the basis of knowledge of any of the individuals or entities or their veracity or reliability." Martinelli analogizes the information received from the Better Business Bureau to that of a confidential informant and argues that the affidavit does not establish the veracity or the foundation for an informant's information. *See United States v. Brundidge*, 170 F.3d 1350, 1352-53 (11th Cir.1999) (noting that the "veracity" and "basis of knowledge" are two factors to consider in determining whether, under the totality of the circumstances, an informant's tip provides probable cause). The district court correctly rejected this argument. Although the affidavit does not specifically name the twenty-three businesses or individuals listed on the report from the Better Business Bureau, or the specific names of the complainants the officer

contacted, those people and entities were neither anonymous nor confidential. Indeed, the affiant officer actually contacted several of them. Plainly they were not unknown. They were simply named victims of a crime who relayed information to the police.

The courts have traditionally viewed information drawn from an ordinary witness or crime victim with considerably less skepticism than information derived from anonymous sources. *See, e.g., Easton v. City of Boulder*, 776 F.2d 1441, 1449 (10th Cir.1985) (noting that "the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness"). Each of the victims had personal knowledge of the crimes; they had done business with WBS. Moreover, there was a high level of corroboration. Each of the complainants Harbuck spoke with reported that they paid money for the same purpose, but, notably, never received any services. Finally, the affidavit, which was submitted in April of 2000, refers to recent complaints or allegations that had been recently verified. *See Jiminez*, 224 F.3d at 1249 (noting that even stale information can provide probable cause when the government "updates, substantiates, or corroborates the stale material" (internal quotation marks omitted)).

"Probable cause to support a search warrant exists when the totality of the circumstances allow a conclusion that there is a fair probability of finding

contraband or evidence at a particular location." *Brundidge,* 170 F.3d at 1352. Here, the affiant relied on personal information from many victims. Harbuck observed the offices and described the materials that would provide evidence of the fraud. Quite simply, there was a "fair probability" that contraband would be found at the locations described, and the warrants were supported by probable cause.

Martinelli also contends that the warrants were overbroad because they permitted the seizure of "all" business files and because they failed to sufficiently describe the crimes that were committed. *See, e.g., United States v. Travers,* 233 F.3d 1327, 1329 (11th Cir.2000) (noting that a "warrant which fails to sufficiently particularize . . . the things to be seized is unconstitutionally over broad"). Again, we review the district court's findings of fact for clear error and its application of law to those facts *de novo. Muegge,* 225 F.3d at 1269.

Although the Fourth Amendment requires that a warrant sufficiently particularize the things to be seized, we have held that the government may seize all of the business records of an enterprise engaged in a "pervasive scheme to defraud." *United States v. Sawyer,* 799 F.2d 1494, 1508 (11th Cir.1986). In *Sawyer,* we upheld a warrant authorizing the seizure of all of the business records of an enterprise where there was substantial evidence from twenty-five customers detailing various fraudulent activities. The fraudulent conduct employed in twenty-five separate instances made it "probable" that the company was

using identical misleading and fraudulent techniques with other customers. *Id.* Here, the affiant had a list of twenty-three Better Business Bureau complainants, the communication from Loving Enterprises, and several other similar complaints lodged by different small-business owners, all alleging precisely the same kind of fraud. Here, there were allegations of a "pervasive scheme" to defraud sufficient to justify the seizure of all company documents. *Id.* at 1508-09; *see also Travers,* 233 F.3d at 1330 (noting that cases involving "complex financial fraud justify a more flexible reading of the fourth amendment particularity requirement" (internal quotation marks and alterations omitted)); *United States v. Hooshmand,* 931 F.2d 725, 736 n. 12 (11th Cir.1991) (rejecting argument that a search warrant should have been limited to the files of the particular patients identified in the supporting affidavits because there was a "pervasive scheme to defraud" (internal quotation marks omitted)).

Martinelli also challenges the breadth of the warrants because they do not identify the crimes that Martinelli allegedly committed. However, the affidavits, which the district judge found were attached to the warrants, describe the fraud in some detail by noting that WBS fraudulently took money from customers although it failed to provide them with any services. When affidavits are attached to a warrant, we will consider the affiant's statements in determining whether the warrant sufficiently identifies the crimes that were allegedly committed. *Cf. United*

States v. Bridges, 344 F.3d 1010, 1018-19 (9th Cir.2003) (finding a search warrant overly broad because it did not describe the crime allegedly committed and the more descriptive affidavits were not attached). The affidavits sufficiently detailed the alleged crimes and the affidavits were attached to the warrants. The warrants were not overbroad.[6]

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[6] We readily dispose of Martinelli's remaining arguments concerning the searches. As for his *Franks* claim, we agree with the district court that Martinelli failed to meet his burden of showing that Harbuck omitted material facts or made materially false statements in the affidavits, much less that he did so intentionally, knowingly, or recklessly. *See United States v. Novaton,* 271 F.3d 968, 986-87 (11th Cir.2001) (noting that to prevail on a *Franks* claim, a defendant must show, among other things, that the affiant knowingly or recklessly made the alleged misrepresentations or omissions). Next, the district court determined that Martinelli did not have "standing" to challenge the WBS search. In order to avoid confusion with Article III standing, the Supreme Court has observed that "the definition of [Fourth Amendment] rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *Minnesota v. Carter,* 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (internal quotation marks omitted). We agree with the district court that Martinelli had no constitutionally protected privacy interest in the items taken during the WBS search because: 1) the lease had expired for the WBS office, giving the landlord the right to reenter and take possession, and 2) the bankruptcy trustee had specifically told Martinelli that he could not touch or remove any of the items that remained in the WBS office. *See id.*(noting that "to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable"); *United States v. McKennon,* 814 F.2d 1539, 1543 (11th Cir.1987) (holding that "[w]hether an individual possesses a constitutionally protected privacy interest

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III.

Martinelli also claims the district court erred in refusing to instruct the jury regarding: (1) the elements of mail fraud; (2) good faith; (3) materiality; (4) mere puffing; (5) the theory that all expenditures do not qualify as promotion transactions; and (6) the theory that merely spending money does not amount to concealment. "We review a district court's refusal to give a requested jury instruction for abuse of discretion." *United States v. Carrasco,* 381 F.3d 1237, 1242 (11th Cir.2004).

> A district court's refusal to give a requested instruction is reversible error if (1) the requested instruction was a correct statement of the law, (2) its subject matter was not substantially covered by other instructions, and (3) its subject matter dealt with an issue in the trial court that was so important that failure to give it seriously impaired the defendant's ability to defend himself.

Id. (internal quotation marks omitted).

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depends upon the totality of circumstances"). Finally, we conclude that the federal warrant was not in any way tainted, because there were no constitutional deficiencies in the foundational state search warrants. Inasmuch as we have sustained the district court's ruling on multiple grounds, we have no occasion to address the trial court's conclusion that even if the warrant was otherwise defective, the good faith exception to the exclusionary rule enunciated by the Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) would sustain the searches and seizures.

Martinelli was indicted for conspiring to launder money pursuant to 18 U.S.C. §§ 1956(a)(1) and (h).[7] Section 1956(a)(1) provides that:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
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> > (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
> >
> > (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

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[7] Specifically, the indictment alleged that between March 1, 1995 and August 31, 2000, Martinelli and two co-defendants did knowingly combine, conspire, confederate, agree and have a tacit understanding with each other and with other persons to engage in and attempt to engage in financial transactions affecting interstate commerce, which financial transactions involved the proceeds of a specified unlawful activity, that is, mail fraud in violation of Title 18, United States Code, Section 1341, knowing that these transactions were designed in whole or in part: (a) to promote the carrying on of a specified unlawful activity; and (b) to conceal and disguise the nature, location, source, ownership and control of the proceeds of said specified unlawful activities; and that while conducting and causing to be conducted such financial transactions, the defendants knew that the property involved in the transactions represented the proceeds of some form of unlawful activity.

> (B) knowing that the transaction is designed in whole or in part –
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> > (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
> >
> > (ii) to avoid a transaction reporting requirement under State or Federal law,
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> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.
>
> Section 1956(h) makes it illegal to conspire to commit a crime defined in, *inter alia,* section 1956(a)(1).

We glean several important points from the plain language of section 1956. First, the government can prove, and in this case attempted to prove, two different kinds of money laundering: "intent to promote" money laundering pursuant to section 1956(a)(1)(A)(i), and "concealment money laundering" pursuant to section 1956(a)(1)(B)(i). Second, both "intent to promote" and "concealment money laundering" require the existence of an underlying "specified unlawful activity." The statute defines a "specified unlawful activity" to encompass numerous federal crimes, including all of those set forth in 18 U.S.C. § 1961(1), *see* 18 U.S.C. § 1956(c)(7)(A), which lists "racketeering

activities" under the RICO statute. For our purposes, it is sufficient that the indictment alleged the "specified unlawful activity" of mail fraud, in violation of 18 U.S.C. § 1341, and that mail fraud is listed as a "racketeering activity" in section 1961(1).

"To obtain a conviction for a . . . money laundering conspiracy . . . the government bears the burden of proving beyond a reasonable doubt that: (1) two or more persons agreed to commit a crime, in this case a . . . money laundering violation; and (2) that [the defendant], knowing the unlawful plan, voluntarily joined the conspiracy." *United States v. Johnson,* 440 F.3d 1286, 1294 (11th Cir.2006). *See also United States v. Alerre,* 430 F.3d 681, 693-94 (4th Cir.2005) (noting that the government has to prove that "(1) a conspiracy to commit promotion money laundering was in existence, and (2) that during the conspiracy, the defendant knew that the proceeds used to further [the] illicit operations had been derived from an illegal activity, and knowingly joined in the conspiracy"), *cert. denied,* 547 U.S. 1113, 126 S.Ct. 1925, 164 L.Ed.2d 667 (2006); *United States v. Threadgill,* 172 F.3d 357, 366 (5th Cir.1999) ("The elements of the offense of conspiracy to commit money laundering are: (1) that there was an agreement between two or more persons to commit money laundering; and (2) that the defendant joined the agreement knowing its purpose and with the intent to further the illegal purpose.").

First, Martinelli says that the district court erred by failing to instruct the jury on the basic elements of

mail fraud, the "specified unlawful activity" underlying the alleged money laundering conspiracy. He argues that mail fraud is a "core element of the offense." Martinelli urges that the district judge should have given Eleventh Circuit Criminal Pattern Jury Instruction 50.1, which sets forth four elements for mail fraud: (1) that the defendant knowingly devised or participated in a scheme to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises; (2) that the false or fraudulent pretenses, representations or promises related to a material fact; (3) that the defendant acted willfully and with an intent to defraud; and (4) that the defendant used the United States Postal Service or a private or commercial interstate carrier by mailing or depositing (or causing to be mailed or deposited) some matter or thing for the purpose of executing the scheme to defraud. Moreover, Martinelli says that the district court erred by failing to define the terms "scheme to defraud," "false," "fraudulent," and "material fact," all of which are defined in pattern jury instruction 50.1.

The government responds that Martinelli failed to raise this issue before the district court and therefore we should review for only plain error. *See United States v. Hasson*, 333 F.3d 1264, 1277 (11th Cir.2003). After thoroughly reviewing the record, we cannot find where Martinelli specifically asked the district judge to instruct on the elements of mail fraud. There is no such request in his proposed jury instructions, and we have been unable to locate any verbal request in the

trial transcript. Indeed, Martinelli's attorney conceded at oral argument that he did not request the mail fraud pattern jury instruction (which sets forth the elements of mail fraud) or an instruction defining "scheme to defraud." Therefore, we review this issue only for plain error. *Id.*

"An appellate court may not correct an error the defendant failed to raise in the district court unless there is: (1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Rodriguez,* 398 F.3d 1291, 1298 (11th Cir.) (internal quotation marks omitted), *cert. denied,* 545 U.S. 1127, 125 S.Ct. 2935, 162 L.Ed.2d 866 (2005). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted).

The lack of an instruction on the elements of mail fraud was not error because, as we explain in greater detail below, Martinelli was not charged with mail fraud and the government did not have to prove he committed mail fraud to convict him of conspiring to launder money. *See, e.g., United States v. Magluta,* 418 F.3d 1166, 1174 (11th Cir.2005). Had the district court given the pattern mail fraud instruction, it would have *incorrectly* told the jury to decide whether the defendant, Martinelli, "knowingly devised or participated in a scheme to defraud," "acted willfully with an intent to defraud," and "used [the United States mails] for the purpose of executing the scheme

to defraud." Eleventh Circuit Criminal Pattern Jury Instruction 50.1. In fact, the government did not have to prove any of those elements; Martinelli simply had to *know* the funds were derived from the specified unlawful activity of mail fraud. *See* 18 U.S.C. § 1956(a)(1). The pattern mail fraud instruction, which details the affirmative actions a defendant must undertake to violate the mail fraud statute, simply does not apply in a money laundering conspiracy case, where the defendant need only have *knowledge* that the funds were derived from mail fraud.

But even if the district court erred by not giving the pattern instructions on mail fraud (which it did not), that error was surely not plain. The district court's instructions are nearly identical to those we recently affirmed under plain error review in another money laundering conspiracy case involving the same specified unlawful activity of mail fraud. *See United States v. Silvestri,* 409 F.3d 1311, 1337 n. 17 (11th Cir.2005). In *Silvestri,* just as in this case, the defendant failed to ask the district judge to instruct the jury on the elements of mail fraud. We held that the trial court did not plainly err by simply telling the jury that the mail fraud statute "makes it a crime or offense for anyone to use the Unites States mails in carrying out a scheme to defraud." *Id.* (internal quotation marks omitted). We noted that the term "defraud" is "well within the common understanding of the jury and therefore need not be defined." *Id.* (internal quotation marks omitted).

If anything, the district judge in the *Martinelli* case provided a *more* detailed instruction on the specified unlawful activity of mail fraud than the one we considered in *Silvestri.* Indeed, here the district court actually paraphrased the language of the mail fraud statute for the jury:

> The term specified unlawful activity here as set out in the indictment means mail fraud. Mail fraud is that crime as defined in Title 18 of the United States Code, Section 1341 as the use of the United States mails for transmitting something by private or commercial interstate carrier in carrying out a scheme to defraud. For purposes of these instructions, it is not important whether the defendant used the mail himself or rather that someone used either the United States Postal Service or some private mail carrier in furtherance of the scheme to defraud as set out in the indictment.

Thus, the district judge provided the jury with a description of mail fraud that closely tracks the language of 18 U.S.C. § 1341, without incorrectly telling the jury that Martinelli had to commit mail fraud. The district court's instructions are consistent with *Silvestri,* and we have been unable to find *any* money laundering conspiracy case that required jury instructions on the elements of the specified unlawful activity. There was no error, plain or otherwise. *See United States v. Aguillard,* 217 F.3d 1319, 1321 (11th Cir.2000) (noting that "an error cannot meet the 'plain' requirement of the plain error rule unless it is

clear under current law" (internal quotation marks omitted)).

Additionally, the lack of an instruction on the elements of mail fraud did not prejudice Martinelli, let alone affect his substantial rights. The jury was fully instructed on the elements of conspiring to launder money, and the district judge made clear that Martinelli had to know the proceeds were derived from the specified unlawful activity of mail fraud. Thus, the absence of instructions on the elements of mail fraud, which were not elements of the charged crime, did not affect Martinelli's rights. For similar reasons, the lack of an instruction on the elements of mail fraud did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding.

Martinelli did, however, specifically request jury instructions on one of the elements of mail fraud – materiality – and, therefore, we review whether the failure to instruct on that element was an abuse of discretion. Not surprisingly, we conclude again that the trial court did not abuse its discretion by refusing to instruct on materiality because Martinelli was not charged with mail fraud. It is by now abundantly clear that in a money laundering case (or in a money laundering conspiracy case), the defendant need not actually commit the alleged specified unlawful activity. *See Magluta,* 418 F.3d at 1174 (noting that the government did not have to prove that a defendant charged with laundering and conspiring to launder money committed the underlying felony drug offenses); *United States v. De La Mata,* 266 F.3d 1275, 1292

(11th Cir.2001) ("A conviction for money laundering does not require proof that the defendant committed the specific predicate offense."); *see also United States v. Awada*, 425 F.3d 522, 525 (8th Cir.2005); *United States v. Smith*, 46 F.3d 1223, 1234 (1st Cir.1995).[8] Indeed, if the district court had instructed as the defendant requested, that any misrepresentation "must be shown by the government with proof beyond a reasonable doubt to be a 'material' misrepresentation," the jury would have incorrectly assumed that it had to find Martinelli violated the materiality

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[8] As the Fourth Circuit explained, "[i]t is clear that a defendant may be convicted of money laundering even if she is not a party to, much less convicted of, the specified unlawful activity." *United States v. Cherry*, 330 F.3d 658, 667 (4th Cir.2003). This is evident from an examination of cases where a defendant was charged with both money laundering (or conspiracy to launder money) and a substantive violation of a specified unlawful activity, was acquitted of the charge related to the underlying crime, yet convicted of money laundering. *See, e.g., United States v. Richard*, 234 F.3d 763, 768-69 (1st Cir.2000) (affirming money laundering conviction even though defendant had been acquitted on the substantive charge of bankruptcy fraud, which was also the specified unlawful activity used to support the laundering charge). Finding a defendant guilty of laundering while acquitting on a count charging substantive violations of the specified unlawful activity is logically consistent because laundering "does not require proof that the defendant committed the specified predicate offense, it merely requires proof that the monetary transaction constituted the proceeds of a predicate offense." *Id.* at 768. Again, Martinelli only had to "know[ ] that the property involved . . . represent[ed] the proceeds of some form of unlawful activity." 18 U.S.C. § 1956(a)(1).

element of the substantive mail fraud offense. That is simply not the law.

Moreover, this case is similar to *United States v. Golb*, 69 F.3d 1417 (9th Cir.1995). In *Golb*, the defendant was charged with the substantive offense of laundering money derived from the specified unlawful activity of drug trafficking. *Id.* at 1429. The *Golb* jury "was instructed 'as a matter of law that the manufacture, importation, and distribution of controlled substances is a specified unlawful activity' and that the government had to prove that at least some of the funds involved represented the proceeds of the 'manufacture, importation and distribution of controlled substances.'" *Id.* The Ninth Circuit rejected the defendant's argument that the trial judge erred by refusing to instruct on all the elements of drug trafficking, holding that "[b]ecause the drug trafficking which was the source of the proceeds was not part of the charged money-laundering offense, *i.e.*, the drug traffickers were not on trial, the jury did not need to be further instructed." *Id.*; *cf. United States v. Lomow*, 266 F.3d 1013, 1017 (9th Cir.2001) (finding that the district judge did not violate Federal Rule of Criminal Procedure 11 by failing to inform the defendant of the elements of mail fraud when accepting his guilty plea on counts of money laundering and conspiracy to launder money). In reaching that conclusion, the Ninth Circuit relied in substantial measure on cases involving a federal statute with a parallel

structure and similar language, the Travel Act, 18 U.S.C. § 1952.[9]

More particularly, the basic structure of the Travel Act is similar to the money laundering statute because it too criminalizes a certain act (*traveling* in interstate commerce or using the mail or any facility in interstate commerce) done with the intent to distribute the proceeds of "any unlawful activity." 18 U.S.C. § 1952(a)(1). Section 1952 lists a number of predicate crimes that qualify as unlawful activities, including "extortion, bribery, or arson" in violation of state or federal law. *Id.* § 1952(b)(2). Because both the Travel Act and the money laundering statute criminalize actions undertaken with knowledge of an underlying "unlawful activity," the Travel Act cases are relevant and persuasive.

Thus, for example, in *United States v. Conway*, 507 F.2d 1047 (5th Cir.1975), the former Fifth Circuit

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[9] The Travel Act makes it illegal to:

> travel[ ] in interstate or foreign commerce or use[ ] the mail or any facility in interstate or foreign commerce, with intent to –
>
> (1) distribute the proceeds of any unlawful activity; or
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> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

18 U.S.C. § 1952(a).

in binding precedent[10] squarely rejected a defendant's argument that the trial judge erred by refusing to instruct the jury on the definition of arson under Maryland law when that was the predicate offense underlying a Travel Act conviction. The court held that "proof of the violation of the [underlying unlawful activity] to which reference is made for purposes of prosecution under [the Travel Act] is not an essential element to be proved in such a federal prosecution." *Id.* at 1051. The former Fifth Circuit opined that

> "[a]rson" is a commonly used and understood word. There was sufficient evidence upon which the jury could find that the appellant traveled in interstate commerce with intent to bomb and/or burn a Maryland building. There is no requirement that the jury be instructed on the Maryland definition of arson and there is no reversible error here.

Id. at 1051-52; *see also United States v. Owens,* 159 F.3d 221, 228 (6th Cir.1998) (finding that the district court did not plainly err by failing to instruct the jury on the elements of the predicate state law offenses in a Travel Act case where the trial judge did read the statutory definitions of the underlying crimes); *United States v. McNeal,* 77 F.3d 938, 944-45 (7th

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[10] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Cir.1996) (concluding that the trial court "fairly and accurately conveyed to the jury the issues before it" by defining the underlying crime in a Travel Act case by quoting from the Illinois intimidation statute); *Cf. United States v. Gallo,* 782 F.2d 1191, 1194-95 (4th Cir.1986) (reversing a Travel Act conviction where the district judge failed to define, in any fashion, the term "unlawful activity").

The district judge did tell the jury no less than four times that the defendant had to know the proceeds were derived from mail fraud. She instructed the jury that the government had to prove beyond a reasonable doubt that

> while conducting and causing to be conducted such financial transactions, the defendant and others *knew* that the property involved represented the proceeds of some form of unlawful activity. . . . The defendant may be convicted of conspiracy on your finding beyond a reasonable doubt that the defendant *knew that the proceeds of the specified unlawful activity of mail fraud* were designed in whole or in part to either promote or to conceal in the proceeds of the mail fraud or both. . . . Money laundering to promote the carrying on of a specified unlawful activity means that the defendant knowingly conducted or attempted to conduct a financial transaction *knowing* that the funds or property involved in the financial transaction represented the proceeds of some form of unlawful activity. . . . Money laundering designed . . . to conceal or disguise the nature,

> location, source, ownership or control of the proceeds of the specified unlawful activity means that the defendant knowingly conducted or attempted to conduct a financial transaction *knowing* that the funds or property in the financial transaction represented the proceeds of some form of unlawful activity. . . .

(emphasis added).

Thus, the district court, without specifically defining "materiality," expressly told the jury that the "specified unlawful activity" in this case involved the use of the United States mails in carrying out a scheme to defraud. No more was required of the trial court.[11]

Moreover, Martinelli has not shown that the trial court's refusal to instruct on materiality – even if this was somehow erroneous – seriously impaired his ability to defend himself, and that standing alone would be fatal to his argument. The kinds of misrepresentations in this case (i.e., falsely advertising completed sales, satisfied customers, and financially-qualified buyers)

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[11] Furthermore, it is not at all clear that, even if the elements of mail fraud were somehow construed as elements of the crime of conspiring to launder money, that it would have been appropriate to instruct the jury on *only* materiality without also instructing on the other elements of mail fraud. *Cf. United States v. Miller*, 22 F.3d 1075, 1080 (11th Cir.1994) (noting that "[i]t is well established that the trial court has the obligation to instruct the jury on *all* the essential elements of the crime charged" (internal quotation marks omitted)).

were anything but immaterial – they went to the heart of the business services Martinelli offered. *See United States v. Neder*, 197 F.3d 1122, 1128 (11th Cir.1999) (noting that a statement is material if it "has a tendency to influence or is capable of influencing a decision" and finding harmless the district court's failure to instruct on materiality in a mail, wire, and bank fraud case).

Next, Martinelli argues that the district court erred in refusing to instruct on the defense of good faith. Martinelli requested this instruction before the district court and, therefore, we review it for abuse of discretion. The government conceded at trial that an instruction on a good faith defense would have been appropriate if there were any facts to support it. The government argued, however, that there was no factual support for a good faith instruction, and the district court agreed. Specifically, the district judge said:

> Well, I agree with the government. There's been no evidence submitted here in this trial of any good faith on Mr. Martinelli's part himself, and if there had been, then I agree with you, Mr. Samuel, that the threshold would be low as to the amount of evidence that would need to be presented in order for this instruction to be given, but there's just been flat no evidence of good faith on the part of Mr. Martinelli himself. So this instruction will also not be given.

The district court correctly observed that the threshold burden a defendant must satisfy to have an instruction on his theory of defense is "extremely low: The defendant is entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in the evidence." *United States v. Ruiz,* 59 F.3d 1151, 1154 (11th Cir.1995) (internal quotation marks and alterations omitted). Although the government put forth voluminous and substantial evidence from many witnesses establishing the fraudulent nature of Martinelli's business, we cannot agree that there was "flat no evidence" of good faith. Although the government presented evidence that Martinelli focused almost exclusively on the sellers, there was also testimony that he hired at least a small number of representatives to deal with the buyers. Indeed, one GBS employee testified that Martinelli wanted him "to do everything possible to see that these businesses got sold." And, while it appears that the computer matching system never actually worked as it was supposed to, there is some evidence that Martinelli hired at least one person to try to make it more efficient. Because the district judge was required for the purposes of this instruction to view the evidence in a light most favorable to the defendant, *see id.,* we disagree with her finding that Martinelli presented *no* evidence of good faith.

That finding does not mean, however, that Martinelli has sustained his burden of showing that the district judge committed reversible error. *See United States v. Sirang,* 70 F.3d 588, 594 (11th Cir.1995)

("[F]ailure to give the proffered instruction on good faith is not per se error [because] we must examine the facts of the case to determine the adequacy of the instructions as a whole and the effect of the omission on the defendant's case."). The second prong of our analysis then requires us to ask whether the subject matter of the requested instruction was "substantially covered by other instructions." *United States v. Carrasco*, 381 F.3d 1237, 1242 (11th Cir.2004).

Although the district judge did not instruct that "good faith" was a complete defense to mail fraud, she did tell the jury repeatedly – as we have noted already – that Martinelli had to know the money represented the proceeds of the specified unlawful activity of mail fraud. The trial judge then stated that the term

> "knowing that the funds or property involved in the financial transaction represented the proceeds of some form of unlawful activity" means that the defendant knew that such funds or property involved in the transaction represented proceeds from some form, though not necessarily which form of activity that constitutes a felony offense under state or federal or foreign law.

Moreover, the district court defined "knowingly" to mean "that the act was done voluntarily and intentionally and not because of accident or mistake." Based on those instructions, the jury plainly had to rule out the possibility that Martinelli actually harbored a good-faith belief in the legitimacy of the

business before it could have found that he knew the money represented proceeds of mail fraud. In other words, based on the instructions the district judge gave, if the jury concluded that Martinelli had a good-faith belief in the legitimacy of the business, it could not have found that he *knew* the funds were the proceeds of mail fraud. *See United States v. Giraldi,* 86 F.3d 1368, 1376 (5th Cir.1996) (finding no abuse of discretion in the lack of instruction on good faith where the district court incorporated the idea of good faith by instructing on specific intent, willfully, and knowingly); *United States v. Rochester,* 898 F.2d 971, 978-79 (5th Cir.1990) (finding no reversible error where the trial court refused to instruct on good faith, but did instruct on the definition of willfully and intent to defraud).[12]

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[12] Moreover, we are not persuaded that our decision in *United States v. Morris,* 20 F.3d 1111 (11th Cir.1994), compels a different outcome. In *Morris,* the defendant was charged with filing false income tax returns and with conspiring to defraud the United States by filing false and fraudulent income tax returns. The government had to prove that the defendant did so willfully, i.e. he did not accidently file the returns believing them to be accurate. The defendant argued that he did not realize the returns were incorrect and requested a good faith instruction. The trial court refused. Instead, it instructed the jury that the defendant had to willfully file the returns, but then did not incorporate into its definition of willful that such a state of mind would preclude a mistake or accident. We held that because the concept of a mistaken or accidental filing was not incorporated into the court's instructions, it was reversible error to refuse the defendant's request for instructions on good faith. *Id.* at 1117-18. Moreover, we noted that the particular instruction was

(Continued on following page)

Additionally, and even more basic, Martinelli cannot carry his burden on the third prong of this analysis because the trial court's failure to instruct on good faith did not seriously impair his ability to defend himself. *See Carrasco,* 381 F.3d at 1242. Unlike the situation we found in *Morris,* the evidence of fraud in this case was overwhelming and the evidence of good faith was slight. Moreover, Martinelli's attorney actually argued good faith to the jury in his closing, urging the jury to believe that Martinelli "was a salesman just like millions of good salesmen in this country who had a good faith belief that he could build a business. His intent was not criminal." *See Giraldi,* 86 F.3d at 1376 (considering the extent to which the defendant was able to argue good faith to the jury, even in the absence of a specific good

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especially important because, unlike with most criminal statutes, a mistake of law (even an unreasonable mistake) was a defense to the tax offense at issue. *Id.* Finally, we noted in *Morris* that the defendant was prejudiced by the refusal to instruct on good faith because the evidence against him was limited and circumstantial while the evidence supporting the proffered defense was "substantial." *Id.* at 1118.

Unlike *Morris,* the district judge in this case made it abundantly clear that the defendant had to act knowing that the money represented the proceeds of mail fraud. The trial court defined "knowing" and "knowingly" in such a way that the jury could not have found that the defendant knew the proceeds were derived from mail fraud if it also found that the defendant was operating a legitimate and non-fraudulent business. Thus, because the good faith defense was essentially incorporated into the court's overall jury instructions, we cannot find an abuse of discretion.

faith instruction). Although it would have been wiser to instruct on the defense of good faith, the district court's failure to do so was not an abuse of discretion because the charge was essentially encompassed in other parts of the jury instructions *and* its absence did not prejudice Martinelli to the extent that it seriously impaired his ability to defend himself. *See United States v. Frazier,* 387 F.3d 1244, 1259 (11th Cir.2004) (en banc) (noting that "under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call" (quoting *Rasbury v. I.R.S. (In re Rasbury),* 24 F.3d 159, 168 (11th Cir.1994))).

Martinelli also argues that the district judge should have instructed on the defense of "mere puffing." We have recognized that "puffing" or "sellers' talk" is not actionable under the mail fraud statute. *See United States v. Brown,* 79 F.3d 1550, 1557 (11th Cir.1996) (noting that "statements that company 'nationally known' and that product 'among the finest . . . in the world' are 'not cognizable under the federal mail fraud statute'" (quoting *United States v. Pearlstein,* 576 F.2d 531, 540 n. 3 (3d Cir.1978))). Here, the trial judge refused to instruct on the "puffing" defense, noting that the evidence "cannot in any stretch be characterized as mere puffery or just a sales pitch." We agree.

The misrepresentations in this case were not exaggerated opinions or hyped-up sales pitches. *See Mfg. Research Corp. v. Greenlee Tool Co.,* 693 F.2d

1037, 1040 (11th Cir.1982) (describing puffing, in the context of a common law unfair competition claim, as "an expression of opinion not made as a representation of fact"). Instead, they were factual statements that were verifiably refutable. Thus, the assertion that all buyers would be prequalified was simply untrue – GBS stopped prequalifying buyers early in the scheme. Also, the brochure showing Martinelli and other GBS employees as satisfied customers was patently false – they had not sold businesses through GBS, and, to the extent that a customer from the *one* completed sale in five years may have been satisfied, there is no evidence he or she ever provided a testimonial for use in GBS advertising. Martinelli does not direct us to a single allegedly fraudulent act that fairly could be considered "puffing," and we have been unable to locate any during our own review of the record. The district court did not abuse its discretion in refusing to instruct on the defense of "puffery" because there was no evidence in support of such a defense.

Next, Martinelli says that the trial judge erred by refusing to instruct the jury that, as to the promotion theory of money laundering, "making payments for business expenses, such as payroll expenses, payroll taxes, rent and other normal business expenses does not amount to 'promoting the carrying on of specified criminal activity.'" The trial judge refused to give the proffered request, noting that she did not "recall evidence of payment of ordinary business expenses such as rent, payroll, and taxes as are

indicated and specified in the proposed instruction, and if there was any such evidence, it was minimal." Moreover, the district judge said that "even if my recollection of the evidence is inaccurate, I think that there is a risk with this instruction that the jury would be confused . . . about what constitutes a legitimate business expense."

Martinelli is correct in observing generally that the government must demonstrate the financial transaction was conducted or attempted "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(i); *accord United States v. Calderon,* 169 F.3d 718, 722-23 (11th Cir.1999) (reversing money laundering convictions because there was "no evidence indicating how the money was to be spent"). Other circuits have developed a line of cases standing for the proposition that a defendant may not be convicted of promotion money laundering "where the proceeds of some relatively minor fraudulent transactions are used to pay the operating expenses of an otherwise legitimate business enterprise." *United States v. Miles,* 360 F.3d 472, 477 (5th Cir.2004) (internal quotation marks omitted). "On the other end of the factual spectrum, however, are cases where, when a business as a whole is illegitimate, even individual expenditures that are not intrinsically unlawful can support a promotion money laundering charge." *Id.* at 478 (internal quotation marks and alterations omitted). Martinelli has not cited a single case, however, where the issue of legitimate business expenses was ever discussed in

jury instructions. Rather, each of the cases cited by Martinelli involved a challenge to the sufficiency of the evidence.

Moreover, we need not address whether Martinelli's proffered instruction was a correct statement of the law because, even if it were, the subject matter of the charge was substantially covered by other instructions.[13] The district judge correctly stated that "[m]oney laundering to promote the carrying on of a specified unlawful activity means . . . that the defendant engaged in the financial transaction with the intent to promote the carrying on of such specified unlawful activity." Additionally, the trial judge used the Eleventh Circuit Pattern Jury Instructions to charge that "[t]he term with the intent to promote the carrying on of the specified unlawful activity means that the defendant must have conducted or attempted to conduct the financial transaction for the purpose of facilitating or making easier or helping to bring about the specified unlawful activity as has been defined."

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[13] The trial judge did note that if she were to give Martinelli's requested instruction, she would then also have to instruct that legitimate business expenses *could* be the basis for a money laundering conspiracy *if* the entire business was fraudulent. *See Miles*, 360 F.3d at 478. The district judge worried that these instructions would confuse the jury, and we agree. The question of whether the expenses were "legitimate" depends exclusively on the extent to which the jury felt the business as a whole was legitimate. This entirely factual inquiry would have become even more confusing if the judge had attempted to define, as a matter of law, the types of expenses that could or could not be considered "legitimate."

See Eleventh Circuit Criminal Pattern Jury Instruction 70.1. Thus, the trial judge properly instructed that the financial transaction had to be conducted or attempted with the intent to promote the mail fraud. Based on those instructions, the jury could not have found Martinelli guilty if it believed the financial transactions were undertaken for legitimate, non-fraudulent business expenses. The requested charge was substantially covered in other instructions. Furthermore, Martinelli has completely failed to demonstrate that the failure to give this requested instruction seriously impaired his ability to defend himself.

Finally, Martinelli argues that the district court erred in refusing to instruct the jury that:

> With regard to the "conceal or disguise the nature, the location, the source, or the control of the proceeds" element of the money laundering statute, I instruct you that merely "spending" money does not amount to money laundering, even if the money is derived from criminal activity. In order to constitute money laundering, the defendant must have had the specific intent to conceal money that was generated from criminal conduct. Moreover, the evidence of "concealment" must be substantial.

The trial judge instructed that

> "[m]oney laundering designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the

> proceeds of the specified unlawful activity means . . . that the defendant engaged in the financial transaction knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of the specified unlawful activity of mail fraud."

Thus, the jury could not have found the defendant guilty without first determining that he knew the transactions were designed to conceal or disguise. The requested instruction was substantially covered in other parts of the charge; there was no abuse of discretion. Just as with the other requests, we are fully satisfied that the trial court's failure to give this charge did not seriously impair Martinelli's ability to defend himself.

IV.

Martinelli also says the district court erred at sentencing by using facts neither admitted by him nor found by the jury in determining the amount of loss and in imposing a four-level adjustment for his role in the offense. Martinelli raised a constitutional objection at sentencing based on the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and the Sixth Amendment. The district judge ruled that the Sentencing Guidelines were constitutional and declined to impose an alternative sentence.

The government correctly acknowledges that this was error in light of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). When a district court commits constitutional *Booker* error, the government must prove beyond a reasonable doubt "that the mandatory, as opposed to the advisory, application of the guidelines did not contribute to the defendant's sentence." *United States v. Davis*, 407 F.3d 1269, 1271 (11th Cir.2005). The government concedes that it cannot sustain its heavy burden. After independent review we agree and, therefore, vacate Martinelli's sentence and remand to the district court for resentencing in light of *Booker*.[14]

V.

In short, we conclude that the district court did not err in refusing to suppress evidence or in charging the jury. Accordingly, we affirm Martinelli's conviction. However, the district court did commit constitutional *Booker* error that was not harmless.

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[14] Martinelli summarily argues that the district court erred in determining the amount of money for which he was held responsible and in determining that he was an organizer or leader pursuant to U.S.S.G. § 3B1.1(a). Because we have vacated the sentence, we have no occasion to review those contentions now.

We vacate Martinelli's sentence and remand for resentencing.[15]

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

COX, Circuit Judge, specially concurring:

I join the court's opinion except for the discussion relating to the jury instruction on mail fraud. Martinelli contends that the district court erred by failing to give an instruction informing the jury of the elements of mail fraud. The court finds that Martinelli failed to preserve the error he now alleges because he did not submit such an instruction at trial. I agree, and therefore also agree that the court's failure to give such an instruction must be reviewed under our plain error test. However, in performing the plain error review, the majority opinion de[illegible]es much more than it must. The court holds that the lack of an instruction on the elements of mail fraud: (1) did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings, (2) did not affect Martinelli's substantial rights, (3) was not plain error, given our precedent, and (4) was not error at all. I agree with the first three of these holdings. Therefore, I concur in the result. I write separately to express my disagreement with the court's holding

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[15] Martinelli moved for release pending appeal. In light of our ruling affirming his conviction, that motion is DENIED.

that the district court did not err in instructing the jury.

It is true, as the court states, that it would not have been error for the district court to refuse to give the pattern instruction on mail fraud. Martinelli was not charged with mail fraud. And, the Government did not have to prove (as the pattern instruction requires) that Martinelli himself committed mail fraud to prove the charged crime of conspiracy to launder monies resulting from mail fraud. But Martinelli does not contend that he was entitled to the pattern instruction; he contends that he was entitled to an instruction informing the jury of the elements of mail fraud. Appellant's Opening Br. at 13-15, 18-20. I agree.

I acknowledge that, in *United States v. Silvestri,* after finding that the defendant in that case had invited any error in the jury instructions and therefore was not entitled to appellate review of them, this court went on to hold that the district court did not err by giving an instruction that only cursorily described mail and wire fraud, the "specified unlawful activities" in that money laundering conspiracy case.[1] 409 F.3d 1311, 1337-38 n. 17 (11th Cir.2005). That

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[1] In *Silvestri,* the district court told the jury that 18 U.S.C. § 1341, "makes it a federal crime or offense for anyone to use the United States mails in carrying out a scheme to defraud," and that 18 U.S.C. § 1343"makes it a federal crime or offense for anyone to use an interstate wire communications facility in carrying out a scheme to defraud." *Silvestri,* 409 F.3d at 1326.

holding in *Silvestri,* though unnecessary to the resolution of the case and confined to a footnote, nevertheless dictates the result in this case. *Johnson v. DeSoto County Bd. of Comm'rs,* 72 F.3d 1556, 1562 (11th Cir.1996) ("[W]e are bound by alternative holdings."); *McLellan v. Mississippi Power & Light Co.,* 545 F.2d 919, 925 n. 21 (5th Cir.1977) ("It has long been settled that *all* alternative rationales for a given result have precedential value."). But, our precedent and common sense counsel that, on that point, *Silvestri* is wrongly decided.

In *United States v. Martinez,* 496 F.2d 664 (5th Cir.1974), a case in which the defendants were tried for conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute, the court held that the jury charge was plainly erroneous because it failed to "apprise [the jurors] of the definition, character or nature of the acts of importing, possessing, or distributing marijuana." *Id.* at 669. Thus, *Martinez* requires that the district court tell the jury the essential character of the object of a conspiracy. Here, the object of the conspiracy was money laundering. But, it was not the laundering of just any monies. Rather, it was the laundering of monies generated by the unlawful activity specified in the indictment-mail fraud.

The text of the money laundering statute itself tells us that this is an important distinction. In pertinent part, the statute reads:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction *which in fact involves the proceeds of specified unlawful activity* –
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> . . . .
>
> (B) knowing that the transaction is designed in whole or in part –
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; [ ]
>
> . . . .
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(1) (emphasis added).

When, in *United States v. Miller,* 22 F.3d 1075 (11th Cir.1994), we considered the appeal of a defendant who was convicted of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i), we found error in the money laundering jury instruction because it mistakenly identified a different "specified unlawful activity" from that charged in the indictment, an unlawful activity that had different elements. We

described the instruction as "clearly flawed," and explained that "a conviction was warranted only if the jury found beyond a reasonable doubt that the checks in question were proceeds from the federal offenses specified in the indictment." *Id.* at 1079. Thus, *Miller* tells us that, in a money laundering case, when a jury is asked to find beyond a reasonable doubt that the laundered funds were proceeds of the "specified unlawful activity" alleged in the indictment, the jury must be instructed correctly what that "specified unlawful activity" is.

In this case, the jury was told that the "specified unlawful activity" was mail fraud, but it was never told exactly what mail fraud is. The jury instructions included this brief description of mail fraud:

> Mail fraud is a crime as defined in Title 18 of the United States Code, Section 1341 as the use of the United States mails [or] transmitting something by private or commercial interstate carrier in carrying out a scheme to defraud. For purposes of these instructions, it is not important whether the defendant used the mail himself or rather that someone used either the United States Postal Service or some private mail carrier in furtherance of the scheme to defraud as set out in the indictment.

The jury in this case was required to find, beyond a reasonable doubt, that: (1) the funds Martinelli allegedly conspired to launder were proceeds of mail fraud, and (2) Martinelli had either intent to promote

the carrying on of mail fraud or knowledge that the money laundering transactions were designed to conceal the proceeds of mail fraud. I do not believe it could do so absent an instruction that stated the elements of mail fraud.

To the extent *Silvestri* concludes otherwise, it is wrongly decided. In proclaiming that the district court's brief descriptions of mail and wire fraud were enough to apprise the jury of the "specified unlawful activity" in that case, *Silvestri* completely ignores *Martinez* and *Miller* and fails to explain how a jury could make the required findings. *Silvestri* relies on the well-accepted premise that terms within the common understanding of the jury need not be defined in the jury instructions. But it extends that rule too far. *Silvestri* cites no authority to support its holding that "defraud" and "promote" are legal terms "well within the common understanding of the jury" and therefore need not be defined. 409 F.3d at 1338 n. 17 (internal quotation omitted). And, even accepting that assertion as true, by focusing on these terms alone, *Silvestri* answers the argument that the jurors may not have understood mail fraud and wire fraud the alleged sources of the monies intended to be laundered by reducing those crimes to just two words. *Silvestri* says that because jurors understand "defraud" and "promote," jurors also understand what mail fraud and wire fraud mean without being told.

Therefore, *Silvestri* reasons, no jury charge defining those crimes is necessary.[2] *Id.*

This holding in *Silvestri* and its application in this case threaten a defendant's right to a jury verdict of guilt beyond a reasonable doubt because they place too much faith in jurors' common understanding. When a "specified unlawful activity" is complicated, like mail fraud, a cursory description of it cannot suffice. The jury should be told the essential character of the unlawful activity that yielded the monies allegedly intended to be laundered. Here, the jury had to find, beyond a reasonable doubt, that the monies Martinelli was charged with laundering arose out of a crime, during which someone (not necessarily Martinelli): (1) used the mails, (2) as part of willful participation in, (3) a scheme to defraud others by making false or fraudulent representations or promises, (4) related to material facts.[3] The jury also had

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[2] If this holding that mail fraud and wire fraud are within the common understanding of jurors is correct, then it must also be true that a defendant charged with mail fraud or wire fraud is not entitled to have the jury instructed on the elements of that offense. That cannot be the law.

[3] The majority opinion misleadingly asserts that the Government did not have to prove any of the elements of mail fraud. While it is true that the Government did not have to prove that Martinelli himself engaged in behavior satisfying each of the elements of that crime, the Government did have to prove, beyond a reasonable doubt, that the monies it accused Martinelli of conspiring to launder were, in fact, proceeds of mail fraud. *See* 18 U.S.C. § 1956(a)(1). Thus, the Government had to

(Continued on following page)

to find that Martinelli conspired to engage in money laundering either with intent to promote the use of the mails for this purpose or with knowledge that he was acting to conceal monies generated by the use of the mails for this purpose. These are not simple determinations, and the defendant has a right to have the court give the jury detailed guidance.

The problem inherent in giving just a cursory description of the "specified unlawful activity" is highlighted when we consider Martinelli's contention that a good faith jury instruction should have been given. Martinelli argued at trial that the money he allegedly conspired to launder was not the proceeds of any fraud but rather the profits of a legitimate business. In support of that defense, Martinelli requested a jury instruction that good faith is a defense to mail fraud and, in this case, money laundering. The court's opinion reasons that, even though there was some evidence of good faith, the district court's refusal to give the good faith instruction was not an abuse of discretion, in part because the district court told the jury that Martinelli had to know that the money he allegedly conspired to launder was the proceeds of unlawful activity. But that instruction did not tell the jury that, in order for the monies to be the proceeds of mail fraud, someone had to have willfully made false representations of material facts for the purpose of

---

prove that mail fraud (including all its elements) was committed and generated those monies.

defrauding others. Martinelli's proposed instruction regarding good faith was targeted at this element of conspiracy to commit money laundering – whether the monies intended to be laundered were actually the proceeds of mail fraud or whether they were the proceeds of innocent representations. So, once again, the questions go unanswered: Without being told exactly what mail fraud is, how could the jury find, beyond a reasonable doubt, that the monies Martinelli conspired to launder were proceeds of mail fraud? And, how could the jury find, beyond a reasonable doubt, that Martinelli conspired to launder the monies with the intent to promote mail fraud or with knowledge that the money laundering transactions were designed to conceal the proceeds of mail fraud?

I concur in the result in this case because, given *Silvestri,* the jury instructions in this case cannot be found deficient. Nevertheless, I think they were deficient. And, I am convinced that *Silvestri* was wrongly decided.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 04-13977-DD & 07-11225-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID E. MARTINELLI,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

ORDER:

(Filed Jul. 18, 2008)

Appellant's motion to recall the mandates in these appeals n [sic] light of the Supreme Court of the United States' issuance of *U.S. v. Santos,* ___ U.S. ___, 128 S.Ct. 2020 (2008) is DENIED. Appellant's conviction was final at the time that *Santos* issued and the only question decided by this Court is whether his sentence on remand was reasonable.

/s/ Stanley Marcus
[illegible initials]
UNITED STATES
CIRCUIT JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 19, 2007

Mr. Donald F. Samuel
Garland, Samuel & Loeb, P.C.
3151 Maple Drive, NE
Atlanta, GA 30303

Re: David E. Martinelli
v. United States
No. 06-1098

Dear Mr. Samuel:

The Court today entered the following order in the above-entitled case:

The Petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-11225-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID E. MARTINELLI,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed May 5, 2008)

Before: BARKETT, MARCUS and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES
CIRCUIT JUDGE

18 U.S.C.A. § 1956. Laundering of monetary instruments

Effective: March 9, 2006

* * *

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

U.S.S.G. §2S1.1. (2000 version) Laundering of Monetary Instruments

(a) Base Offense Level:

(1) 23, if convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A);

(2) 20, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.

(2) If the value of the funds exceeded $100,000, increase the offense level as follows:

Value (Apply the Greatest) Increase in Level

(A) $100,000 or less no increase

(B) More than $100,000 add 1

(C) More than $200,000 add 2

(D) More than $350,000 add 3

(E) More than $600,000 add 4

(F) More than $1,000,000 add 5

(G) More than $2,000,000 add 6

(H) More than $3,500,000 add 7

(I) More than $6,000,000 add 8

(J) More than $10,000,000 add 9

(K) More than $20,000,000 add 10

(L) More than $35,000,000 add 11

(M) More than $60,000,000 add 12

(N) More than $100,000,000 add 13.

(c) Special Instruction for Fines – Organizations

(1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:

(A) the greater of $250,000 or 100 percent of the value of the funds if subsections (a)(1) and (b)(1) are used to determine the offense level; or

(B) the greater of $200,000 or 70 percent of the value of the funds if subsections (a)(2) and (b)(1) are used to determine the offense level; or

(C) the greater of $200,000 or 70 percent of the value of the funds if subsection (a)(1) but not (b)(1) is used to determine the offense level; or

(D) the greater of $150,000 or 50 percent of the value of the funds if subsection (a)(2) but not (b)(1) is used to determine the offense level.

Commentary

Statutory Provision: 18 U.S.C. § 1956.

Background: The statute covered by this guideline is a part of the Anti-Drug Abuse Act of 1986, and prohibits financial transactions involving funds that are the proceeds of "specified unlawful activity," if such transactions are intended to facilitate that activity, or conceal the nature of the proceeds or avoid a transaction reporting requirement. The maximum term of imprisonment authorized is twenty years.

In keeping with the clear intent of the legislation, this guideline provides for substantial punishment. The punishment is higher than that specified in §2S1.2 and §2S1.3 because of the higher statutory maximum, and the added elements as to source of funds, knowledge, and intent.

A higher base offense level is specified if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A) because those subsections apply to defendants who encouraged or facilitated the commission of further crimes. Effective November 18, 1988, 18 U.S.C. § 1956(a)(1)(A) contains two subdivisions. The base offense level of 23 applies to § 1956(a)(1)(A)(i) and (ii).

The amount of money involved is included as a factor because it is an indicator of the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise. Narcotics trafficking is included as a factor because of the clearly expressed

Congressional intent to adequately punish persons involved in that activity.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	**Appeal No. 04-13977-DD**
v.	:	
DAVID E. MARTINELLI,	:	
Appellant.	:	
UNITED STATES OF AMERICA,	:	
Appellee,	:	**Appeal No. 07-11225-EE**
v.	:	
DAVID E. MARTINELLI,	:	
Appellant.	:	

MOTION TO RECALL MANDATE

(Filed Jul. 9, 2008)

COMES NOW Appellant, David Martinelli, and hereby moves this Court to recall the mandate issued in the above-referenced matters. In support therefore, Appellant shows this Court the following:

MOTION TO RECALL MANDATE

David Martinelli was indicted in the Northern District of Florida on August 21, 2003 and charged with one count of conspiring to commit money

laundering in violation of 18 U.S.C. §1956(h). The case was tried before a jury in April, 2004 in the Pensacola Division of the District Court for the Northern District of Florida. The essence of the charge and proof was that Mr. Martinelli through various corporations, defrauded purchasers of advertising through the predicate offense of mail fraud and that all funds, which were deposited in the corporations' bank accounts constituted proceeds of the mail fraud offense and therefore constituted money laundering. Despite argument throughout the course of trial, including during the formulation of the jury instructions, the trial court rejected the defendant's view that the expenses of running his company, including paying employees, paying utility bills, paying withholding taxes and other ordinary business expenses were not excluded in determining what financial transactions amounted to money laundering. The trial court concluded that if the funds went into the bank, the jury could consider those funds as proceeds. Mr. Martinelli was found guilty on the sole count of the indictment.

A Notice of Appeal was timely filed and Appeal No. 04-13977 was docketed. Issues raised by this first appeal included, but were not limited to, the failure of the District Court to give certain jury instructions. One such issue raised concerned the failure of the court to instruct the jury regarding the defense theory that all financial transactions do not qualify as promotion transactions (§ 1956(a)(1)(A)(1)) and the theory that merely spending money does not amount

to concealment under the money laundering statute. *See United States v. Martinelli*, 454 F.3d 1300, 1309 (11th Cir. 2006). (A true and correct copy of the Opinion is attached hereto as Exhibit "A"). He also raised the constitutional issue preserved as to sentencing based on the Supreme Court decision in *Blakely v. Washington*, 542 U.S. 295 (2004).

This Court affirmed the conviction finding that in its opinion, the subject matter of the charges requested were covered by other charges and cited this court's 11th Circuit pattern instruction. This court remanded the case to the trial court for re-sentencing in light of *United States v. Booker*, 543 U.S. 220 (2005). In September of 2006, this Court denied the Petition for Rehearing. The mandate issued on September 15, 2006.

Thereafter, the case proceeded to the district court for resentencing. After a lengthy sentencing hearing, the Court sentenced Mr. Martinelli to 210 months. One of the principal arguments raised during the course of the sentencing (and subsequently on appeal) was the method of calculating the money laundering amount for purposes of U.S.S.G. §2S1.1). Mr. Martinelli further argued that the government's burden included showing how much money was in fact laundered. However, despite Mr. Martinelli's assertions, the trial court concluded that *all* the money derived from the fraudulent sales amount to "proceeds," regardless of whether the money was used to pay taxes, to pay utility bills, to pay commissions

and to pay other legitimate expenses of the corporations.

A Notice of Appeal was filed and the second appeal, Appeal No. 07-11225 was docketed.

The primary issue raised by Mr. Martinelli in this second appeal was whether the district court erred in calculating the "value of the funds" for purpose of USSG §2S1.1(b)(2) because if failed to determine the actual amount that was laundered. This Court denied the appeal in an unpublished opinion on February 13, 2008. *See United States v. Martinelli*, 265 Fed. Appx. 784, 2008 WL 398890 (11th Cir. 2008) (a true and correct copy os [sic] attached hereto as Exhibit "B") finding that the district court was only required to determine the "value of the funds," not the amount of laundered funds".

On March 5, 2008, Appellant petitioned the Court for Rehearing En Banc. The Petition was denied in May of 2008. On May 3, 2008 the mandate issued.

On June 2, 2008, the United States Supreme Court decided the case of *United States v. Santos*, ___ S.Ct. ___, 2008 WL 2229212 (2008). *Santos* held, in essence, that the term "proceeds" as used in the money laundering statute was ambiguous thus invoking the rule of lenity. It further found that as it applied to the money laundering statute, "proceeds" refer to "profits" not "receipts." In *Santos*, the money laundering charges were based on the defendant's payment to lottery winners and his employees. The

charges brought against the co-defendant were based on his receipt of payments as an employee. As neither transaction was fairly characterized as a transaction involving profits, the Court held that the government failed to show that the defendants laundered criminal profits. Therefore, the Supreme Court upheld the Seventh Circuit decision regarding the granting of a Motion filed for Post Conviction Relief.

David Martinelli repeatedly argued at trial, sentencing and through the appellate process that the government was required to show more than deposits in a bank account to establish the offense of money laundering. *Santos* has now confirmed the correctness of this position.

Pursuant to this Court's rules, to prevent injustice a mandate may be recalled. *See* 11th Circuit Rule 41-1(b). In the present matter, the definition of the crime charged in this case has been limited by the Supreme Court, a limitation which would result in a different decision by this Court in both appeals. The sentencing of Mr. Martinelli, where the guidelines were determined based solely on money received, not profits as required by *Santos*, would certainly have a significant impact on his Guideline calculation. The mandate, therefore, in case 07-11225-EE, should be recalled as the intervening authority has changed the law which would apply to Mr. Martinellis's sentencing. Failure to do so would in fact result in a manifest injustice.

In regard to case 04-13977-DD, the local rules, require an additional showing of why the request for recall of the mandate was no [sic] made within one year from the issuance of the mandate. Simply stated, *Santos* was not decided until June 2, 2008. There was no basis for a Motion to Recall prior to this decision. Now, however, with *Santos* having been decided, the decision of this court regarding the jury instruction would have certainly been different and would have resulted in a reversal of Mr. Martinelli's conviction. Had *Santos* been decided earlier, this Court would in all likelihood have ordered the case remanded for retrial. As a result, the delay was unavoidable and corrected within weeks after the decision in *Santos*. Manifest injustice will ensue if the mandate is not recalled.

WHEREFORE, Appellant respectfully requests that this Court

(1) recall the mandate issued in Case No. 07-11225-EE and reconsider its prior decision in light of *Santos*;

(2) recall the mandate issued in Case No. 04-13977-DD and reconsider its prior decision in light of *Santos*; and/or

(3) Issue such other orders or grant such other relief as this Court may deem just, proper and equitable under the circumstances.

Respectfully Submitted,

GARLAND, SAMUEL &
LOEB P.C.

BY: /s/ Edward Garland
EDWARD T. M. GARLAND
Ga. State Bar No. 284900

BY: /s/ Donald F. Samuel
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COUNSEL FOR
DAVID MARTINELLI

Supreme Court, U.S.
FILED
NOV 14 2008
OFFICE OF THE CLERK

No. 08-148

In the Supreme Court of the United States

DAVID E. MARTINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
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QUESTIONS PRESENTED

1. Whether petitioner's conviction for conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h), was invalid because the financial transactions alleged to have constituted promotion money laundering involved payment of expenses of the proceeds-generating offense.

2. Whether, in calculating the "value of the funds" for purposes of determining petitioner's offense level under Sentencing Guidelines § 2S1.1 (2000) for money laundering conspiracy, the district court erroneously counted funds used in transactions that did not involve profits from the underlying offense.

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In the Supreme Court of the United States

No. 08-148

DAVID E. MARTINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is not published in the Federal Reporter but is available at 265 Fed. Appx. 784. An earlier opinion of the court of appeals (Pet. App. 13-62) is reported at 454 F.3d 1300.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2008. A petition for rehearing was denied on May 5, 2008 (Pet. App. 65-66). The petition for a writ of certiorari was filed on August 4, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Florida, petitioner was con-

victed of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 13. He was sentenced to 210 months of imprisonment. The court of appeals affirmed his conviction, but vacated his sentence and remanded for resentencing. *Ibid.* This Court denied a petition for a writ of certiorari. *Id.* at 64. On remand, the district court reimposed the 210-month sentence, and the court of appeals affirmed. *Id.* at 1-12.

1. The evidence at trial showed that, in 1995, petitioner and others formed Global Business Services, Inc. (GBS), a corporation ostensibly in the business of facilitating the sale of small businesses by putting sellers in contact with buyers. GBS told potential sellers that it would advertise in national publications that it had businesses for sale. When interested buyers responded, GBS would attempt to match them with compatible sellers. Each seller was required to pay a percentage of the total value of his business in exchange for the advertising, as well as an additional fee if the business actually sold. Pet. App. 14.

GBS made numerous misrepresentations to its clients. For example, GBS sent direct mailings to small-business owners with testimonials from allegedly satisfied customers describing how GBS had helped sell their businesses, when in fact there were no such customers. GBS represented in its mailings that all of its prospective buyers were prequalified to ensure that they had the financial ability to purchase a business, when in fact that screening was discontinued soon after GBS was formed. GBS represented to clients that it used a sophisticated computer matching system to bring compatible buyers and sellers together, when in fact it had no computers. Pet. App. 15.

Many of GBS's clients never received any "match" at all, and those who did often found that the person purportedly interested in their business did not exist, had never heard of GBS, had no interest in buying a business, or was interested in a wholly unrelated type of business. GBS gave sellers contact names of fictitious GBS employees, and petitioner placated complaining clients by sending them bogus "matches." Petitioner personally wrote many of the fraudulent mailings; employed fake names in GBS correspondence to conceal his role in the operation and to make it appear that GBS had a large workforce; and falsified documents submitted to the Better Business Bureau. Between 1995 and 2000, GBS arranged the sale of only one business. Pet. App. 16-18.

When a seller made payment after signing a contract with GBS, GBS generally deposited the money in one of several GBS-controlled bank accounts. Between 1995 and 2000, GBS deposited approximately $6.6 million into those bank accounts. The fraudulently obtained money in the GBS-controlled accounts was used to pay the expenses of the scheme and to enable its expansion—*e.g.*, to pay for more fraudulent brochures and mailings, which were used to solicit new clients and thus to generate additional illegal receipts. Petitioner and his family also used funds in the GBS accounts for personal expenditures, such as clothing and cellular phone service. In addition, GBS credit cards were used to pay personal expenses for petitioner's family. Pet. App. 18-19; Gov't C.A. Br. xvii (04-13977).

Petitioner also used bank accounts in the name of the fictitious "A-O Trust" to receive some client payments, pay expenses of the fraudulent scheme, and fund personal expenses, such as meals and jewelry. Pet. App. 18

n.4. In addition, each month, petitioner retained between $4000 and $5000 worth of the sellers' checks, cashed them, and used the money for his personal expenses. Gov't C.A. Br. 29 (07-11225).

Petitioner moved funds among the various accounts to create the false impression that some of the funds represented loans to and from GBS. In one instance, for example, GBS funds were deposited into a trust fund controlled by petitioner, withdrawn via a check made out to cash, converted into a cashier's check, and then redeposited into a GBS account as the proceeds of a "loan." Pet. App. 18-19.

2. Section 1956(h) of Title 18 of the United States Code makes it a crime to conspire to violate the substantive provisions of 18 U.S.C. 1956. Section 1956(a)(1), in turn, makes it a crime, "knowing that a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[] * * * a financial transaction which in fact involves the proceeds of specified unlawful activity," either "with the intent to promote the carrying on of specified unlawful activity," or "knowing that the transaction is designed in whole or part * * * to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. 1956(a)(1).

Petitioner was charged with and convicted of conspiring to commit both promotion and concealment money laundering. Indictment 4. The financial transactions supporting the promotion object of the conspiracy included the payment of GBS's expenses using revenue from the fraudulent scheme. See *id.* at 6-15. The financial transactions supporting the concealment object of the conspiracy included the deposits into and out of the fictitious "A-O Trust," as well as transactions into and

out of various other GBS accounts designed to generate the fictitious loans. See *ibid.*

3. Petitioner's initial sentencing took place before this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). Using the 2000 edition of the Federal Sentencing Guidelines Manual, the district court assigned petitioner a base offense level of 23 under Sentencing Guidelines § 2S1.1. The court added eight levels because the "value of the funds" involved in petitioner's offense exceeded $6 million. See Sentencing Guidelines § 2S1.1(b)(2)(i) (2000). The court added an additional four levels for petitioner's aggravating role in the offense. See *id.* § 3B1.1(a). Based on the resulting total offense level of 35 and petitioner's criminal history category of II, petitioner's sentencing range under the Guidelines was 188 to 235 months. Treating the Guidelines as mandatory pursuant to 18 U.S.C. 3553(b) (2000), the district court sentenced petitioner to 210 months of imprisonment. See Gov't C.A. Br. 8-9, 14 (07-11225).

4. As relevant here, petitioner contended on appeal that the district court had erroneously refused to instruct the jury that paying for "legitimate business expenses," such as salaries, taxes, and rent, "does not amount to 'promoting the carrying on of specified criminal activity.'" Pet. App. 48-49. The court of appeals rejected that argument. *Id.* at 48-51.

The court of appeals observed that, when a business as a whole is illegitimate, even expenditures that are not intrinsically unlawful can support a promotion money laundering charge. Pet. App. 49. The court, however, declined to decide whether petitioner's proffered instruction was a correct statement of the law, because the court concluded that other instructions adequately conveyed the same point. *Id.* at 50. The court explained

that the district court had correctly instructed the jury that, to constitute money laundering, a financial transaction had to be conducted or attempted with the intent to promote the fraudulent scheme. *Id.* at 51. Based on those instructions, the court of appeals reasoned, the jury could not have found petitioner guilty under the promotion theory if it believed that the financial transactions consisted of the payment of "legitimate, non-fraudulent business expenses." *Ibid.* Petitioner made no argument based on the meaning of "proceeds" under the money laundering statute, 18 U.S.C. 1956(a)(1), and the court of appeals did not address that issue.

Although the court of appeals upheld petitioner's conviction, it vacated his sentence and remanded for resentencing. Pet. App. 53-54. The court held that the district court had acted in contravention of this Court's decision in *Booker* when it had enhanced petitioner's sentence under the then-mandatory Sentencing Guidelines based on facts neither admitted by petitioner nor found by the jury. Pet. App. 52-53.

5. After the district court reimposed the same 210-month sentence on remand, this time treating the Guidelines as advisory only, petitioner appealed the new sentence. As relevant here, petitioner contended that the district court had erred in calculating the "value of the funds" under Sentencing Guidelines § 2S1.1(b)(2) (2000). Pet. App. 2. In particular, petitioner argued that the court incorrectly based the calculation on *all* the money fraudulently obtained, including money used to pay "legitimate[]" expenses of GBS. *Ibid.* The court of appeals rejected petitioner's argument. *Id.* at 2-6.

The court of appeals held that, under the applicable 2000 edition of the Sentencing Guidelines manual, the "value of the funds" was not limited to "laundered

funds," but included funds derived from "all acts and omissions committed by [petitioner] during the commission of the offense." Pet. App. 6. The court concluded that the district court did not "clearly err" in calculating the "value of the funds" as $6.1 million because that "entire amount was indisputedly involved in the course of the criminal conduct." *Id.* at 5-6. The court rejected petitioner's claim that his 210-month sentence was unreasonable. *Id.* at 9-12.

6. Following the decision in petitioner's second appeal, this Court held in *United States* v. *Santos*, 128 S. Ct. 2020 (2008), that, to establish promotion money laundering in violation of Section 1956(a)(1) based on a transaction involving the "proceeds" of an illegal gambling business, in violation of 18 U.S.C. 1955, the government must prove that the transaction involved the profits, rather than the gross receipts, of the business. Thereafter, petitioner filed a motion in the court of appeals to recall the mandate in light of *Santos*. Pet. App. 72-78. The court of appeals denied the motion. *Id.* at 63. The court stated that "[petitioner's] conviction was final at the time that *Santos* issued and the only question decided by this Court is whether his sentence on remand was reasonable." *Ibid.*

ARGUMENT

In this Court, petitioner now relies on *Santos* (Pet. 7-9) to challenge both his conviction and sentence. Petitioner contends that his conviction was invalid because the alleged promotion transactions consisted of the payment of the expenses of his fraudulent scheme and therefore were not transactions in profits from the scheme, as required by *Santos*. Pet. 8. As for his sentence, petitioner contends that in determining the "value

of the funds" for purposes of Sentencing Guidelines § 2S1.1 (2000), the district court erroneously counted funds that petitioner used to pay his business expenses, such as salaries, taxes, and utilities, because those funds were not laundered under *Santos*. Pet. 8. Those challenges are not properly raised in this Court, and they lack merit in any event. Accordingly, the Court should deny the petition for a writ of certiorari.

1. a. Petitioner did not properly preserve for this Court's review any challenge to his conviction based on the meaning of "proceeds" in 18 U.S.C. 1956(a)(1), which was at issue in this Court's decision in *Santos*. Petitioner argued in the courts below that paying the expenses of his fraudulent enterprise did not constitute promotion money laundering because the payment of legitimate business expenses does not "promote the carrying on specified unlawful activity" as required by 18 U.S.C. 1956(a)(1)(A)(i). See Pet. App. 48-51. He did not make any argument based on the meaning of the term "proceeds" in Section 1956(a)(1), and the court of appeals did not address that issue. That default should preclude review here. If petitioner believes that his conduct did not amount to money laundering in light of *Santos*, then his proper recourse is to file a motion for collateral relief from his conviction and sentence under 28 U.S.C. 2255, where he could attempt to make the factual showing of actual innocence necessary for him to overcome his procedural default. Cf. *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998).

b. In any event, petitioner's reliance on *Santos* is unavailing. Contrary to petitioner's suggestion (Pet. 7), *Santos* did not hold that "proceeds" universally means "profits" in Section 1956. No opinion spoke for a majority of the Court in *Santos*. The result in *Santos* was

that, in order to establish a violation of 18 U.S.C. 1956(a)(1)(A)(i) in which the government alleges that the defendant laundered the "proceeds" of an illegal gambling business in violation of 18 U.S.C. 1955, the government must prove that the alleged laundering transactions involved the profits, rather than the gross receipts, of the business. See *Santos*, 128 S. Ct. at 2026 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment). Because of the fractured nature of the decision, however, *Santos* does not resolve the question whether the government was required to prove that the financial transactions underlying petitioner's money laundering conviction involved profits, because petitioner's conviction rests on a different predicate "specified unlawful activity" (SUA) (mail fraud rather than operating an illegal gambling business). *Santos* does not address the meaning of "proceeds" in those circumstances.

The general rule for ascertaining the holding of a case in which there is no majority opinion is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)). As this Court has recognized, however, the *Marks* test is frequently "more easily stated than applied." *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003); *Nichols* v. *United States*, 511 U.S. 738, 745-746 (1994). In some cases, there may be "no lowest common denominator or 'narrowest grounds' that represents the Court's holding." *Ibid.* (concluding that it was "not useful to pursue the *Marks* inquiry").

When there is no "one opinion [that] can meaningfully be regarded as 'narrower' than another" in the sense that it is a "logical subset of other, broader opin-

ions," the traditional *Marks* analysis does not apply. *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S. 1229 (1992)); *e.g.*, *United States* v. *Johnson*, 467 F.3d 56, 63-64 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007); *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 170 (3d Cir.), cert. denied, 528 U.S. 1003 (1999). In such a case, it may be possible to find a legal theory shared by a majority of the Justices by looking to a combination of the plurality or concurring opinions and the dissent. See, *e.g.*, *Johnson*, 467 F.3d at 64-66. But where that inquiry also proves unavailing, then "the only binding aspect of [the] splintered decision is its specific result." *Anker Energy Corp.*, 177 F.3d at 170.

That is the situation with *Santos*. Although the plurality opinion suggests that Justice Stevens's concurring opinion rests on a narrower ground, 128 S. Ct. at 2031, neither Justice Stevens's opinion nor the plurality opinion is a "logical subset" of the other. The plurality opinion rests on the rationale that "proceeds" has a single meaning for all SUAs, and that meaning is "profits." See *id.* at 2029-2030. Justice Stevens's opinion is based on the rationale that "proceeds" has a different meaning for different SUAs. *Id.* at 2033. Neither opinion is a logical subset of the other or can provide a common denominator because they rest on inconsistent premises. Similarly, neither opinion can be combined with the reasoning of the dissent to generate a controlling legal principle because the dissent concludes that "proceeds" always means "gross receipts." *Id.* at 2044. The dissent thus rejects both Justice Stevens's premise that "proceeds" has different meanings for different SUAs and the plurality's conclusion that "proceeds" means "prof-

its." See *ibid.* Accordingly, the only binding aspect of the *Santos* decision is its specific result, which does not address the circumstances of petitioner's case.

c. Even if the "profits" requirement applied in this case, petitioner's challenge to his conviction based on *Santos* would lack merit. In *Santos*, the charged financial transactions consisted of payments of winning bettors and runners' salaries using the proceeds of an illegal lottery operation. Members of the Court adopted the "profits" definition of "proceeds" in order to avoid the result whereby the payment of such "normal" or "essential" expenses of a gambling business would constitute money laundering. 128 S. Ct. at 2027 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment). Those Justices were concerned that, if the money laundering statute covered paying the essential expenses of the underlying crime, then the money laundering charge would merge with the proceeds-generating crime, so that a separate conviction for money laundering would be tantamount to a second conviction for the same offense. *Id.* at 2026-2027 (plurality opinion); *id.* at 2032-2033 (Stevens, J., concurring in the judgment).

This case does not present the merger problem that concerned the Court in *Santos* because several of the transactions underlying the money laundering charges against petitioner did not involve the payment of essential expenses of the fraudulent scheme. As petitioner notes, some of the promotion transactions involved the payment of "utilities and taxes." Pet. 5. Such expenditures, unlike, for example, the cost of producing and mailing the fraudulent solicitations, were not "essential" expenses of the fraud operation. Similarly, some of the concealment transactions did not involve expense pay-

ments at all, but rather the movement of funds between accounts to generate the appearance of fictitious loans or deposits into and withdrawals from the fictitious "A-O Trust." See Pet. App. 18-19 & n.4; pp. 4-5, *supra*. Accordingly, petitioner errs in contending (Pet. 8) that the transactions, by definition, cannot qualify as transactions in "profits" under *Santos*.

Petitioner does not contend that his fraudulent scheme was not profitable, and ample evidence indicates that it was. The scheme lasted for five years and took in more than $6.6 million dollars yet had only limited expenses. See Pet. App. 14-19. Furthermore, the illegal business expanded over that five-year period as the proceeds were reinvested, "generating still more illegal proceeds." *Id.* at 18. And the proceeds of the business were routinely diverted to the personal use of petitioner and his family, which could not have occurred if the receipts were completely consumed by the scheme's expenses. See *id.* at 18 & n.4; pp. 3-4, *supra*. Accordingly, petitioner's challenge to his conviction based on *Santos* is unavailing.

2. Petitioner's *Santos*-based challenge to his sentence likewise lacks merit. Petitioner also failed to preserve that claim for this Court's review. The 2000 version of the Sentencing Guidelines was applied here, and, for money laundering, it provided for an enhancement to petitioner's base offense level based on the "value of the funds" involved in the offense if that figure exceeded $100,000. Sentencing Guidelines § 2S1.1(b)(2). On appeal, petitioner contended that the district court erred in calculating the "value of the funds" because the court counted all the money fraudulently obtained by the company instead of only the amount of money that was actually laundered. He argued that a considerable amount

of the company's receipts were not laundered because they were "used legitimately by the company." Pet. App. 2. Petitioner did not argue that the company's receipts were not laundered because the money laundering statute, by using the term "proceeds," prohibits only the laundering of "profits." Accordingly, petitioner failed to preserve his present claim based on *Santos*.

In any event, in rejecting petitioner's challenge to his sentence, the court of appeals noted that "the [district] court was required to determine the 'value of the funds,' not the amount of 'laundered funds.'" Pet. App. 6; see Sentencing Guidelines § 2S1.1(b)(2) (2000). The court held that the "value of the funds" involved in the offense includes "the total amount of funds * * * involved in the course of criminal conduct." Pet. App. 4 (quoting *United States* v. *Barrios*, 993 F.2d 1522, 1524 (11th Cir. 1993)). Applying that test, the court of appeals did not limit its consideration to funds involved in the unlawful transactions. Thus, even if petitioner had used some of the fraudulently obtained money to engage in financial transactions that did not constitute money laundering under *Santos*, the court of appeals would have concluded that the money was properly counted in calculating the "value of the funds," and it would have rejected petitioner's challenge to his sentence. In this Court, petitioner has not challenged the Eleventh Circuit's interpretation of the term "value of the funds" in the 2000 version of the guideline.*

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* Effective November 1, 2001, the Sentencing Commission amended Sentencing Guidelines § 2S1.1 to change the method for determining the offense level for money laundering, and, in so doing, the Commission eliminated the term "value of the funds." See Sentencing Guidelines App. C, amend. 634. Under the current Guidelines, the base offense level for money laundering is determined using the offense level

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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for the underlying offense from which the laundered funds were derived, or, in some circumstances, by reference to a chart in § 2B1.1 corresponding to "the value of the laundered funds." Sentencing Guidelines § 2S1.1(a). The term "laundered funds" is defined as "the property, funds, or monetary instrument involved in the * * * financial transaction * * * in violation of 18 U.S.C. § 1956." *Id.* § 2S1.1, comment. (n.1). The question of how to construe the term "value of the funds" in the 2000 version of the money laundering guideline is therefore of negligible continuing importance.